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Everything You Always Wanted to Know about How Amendments are Made, but Were Afraid to Ask

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Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask*

By BRENDON TROY ISHIKAWA**

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* Cf. DAVID R. REUBEN, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX, BUT WERE AFRAID TO ASK* (1969). Neither subject, of course, can be done justice in a single work—with one possible exception. See Woody Allen’s *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX* BUT WERE AFRAID TO ASK* (MGM/UA 1972).

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Introduction

Amendments to the United States Constitution gestate in a curiously ill-understood manner. We know little about constitutional facts of life even with two hundred years of amending experience, the guidance of Article V, and about¹ twenty-seven amendments. Despite the importance of questions about the amending process, there has been a remarkable reluctance to answer them. Perhaps this is because the amending process has suffered so long from uncertainty and inconsistent approaches that any resolution seems to require accepting the unacceptable. Wariness of throwing out the baby with the bath water has dampened desires to risk throwing out long-accepted amendments for the sake of cleaning up and enforcing rules of the amending process. This prospect looms in three issues: (1) a state's right to rescind its earlier ratification of an amendment still pending, (2) the possibility of ratification time limits, and (3) the propriety of congressional promulgation and declaration of an amendment's successful ratification.

First, consider whether a state may rescind its earlier ratification of a still-pending amendment. If a state may rescind, then Congress has been acting unconstitutionally by disregarding state rescissions when it has declared amendments ratified, and well-established histor-

1. Cf. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 25 (Sanford Levinson ed., 1995).

ical precedent would be a history of serious constitutional error.² If, however, a state may not rescind, then an amendment Congress proposed in 1861 to entrench slavery may continue to slouch toward birth.³ This possibility proves disturbing in light of the lesson of the Twenty-Seventh Amendment: that sporadic ire in state legislatures can push an amendment toward ratification—even if it takes centuries.⁴ Moreover, denying states the power to rescind earlier ratifications may frustrate their constitutional role as barometers of popular support for a particular fundamental governmental change.⁵ In short, the dilemma seems to force a choice between well-established congressional precedent and the denial of states' roles in ensuring that the Constitution rests upon the consent of the governed.

Next, consider whether pending amendments expire if not ratified within a timely manner. The Supreme Court has held that pending amendments expire if not ratified within a "reasonable time."⁶ If they do expire, then surely the putative Twenty-Seventh Amendment must be stillborn after a 203-year gestation. Yet, it would be a shame to disallow James Madison's eminently sensible Amendment. Unsurprisingly, the scholarly commentary on this provision against self-deal-

2. Most famously, the Fourteenth Amendment was declared to be validly ratified despite the fact that the Ohio and New Jersey legislatures sent notices of their attempted rescissions. Congress continued its practice of ignoring rescission attempts with the Fifteenth and Nineteenth Amendments. See generally SAMUEL S. FREEDMAN & PAMELA J. NAUGHTON, *ERA: MAY A STATE CHANGE ITS VOTE?* 15-18 (1978).

3. Unlike the Thirteenth Amendment, which outlawed involuntary servitude after the Civil War, the Corwin Amendment was intended to avert that war with a compromise on entrenching slavery. In March 1861, Congress proposed: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." H.R. Doc. No. 54-353, at 196 (1861).

4. The Twenty-Seventh Amendment required 202 years to be ratified following its congressional passage. In 1789, James Madison presented it as the second of 12 amendments, of which the last 10 would become our extant Bill of Rights. The Amendment then received nearly all the votes it required. Ultimately, however, it failed passage and was all but forgotten until the congressional "salary grab act" in 1873. In response, the Ohio Senate passed a resolution purporting to ratify it. Again, the Amendment languished. See generally Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497 (1992).

5. See *infra* Part I.B (examining the role of states in amending Federal Constitution).

6. *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921). The definition of "reasonable time," however, has been the subject of controversy as Justices have intimated that 13 years suffices for an amendment to lapse. See *Coleman v. Miller*, 307 U.S. 433, 451-54 (1938) (stating, in dicta, that Congress could legitimately find the challenged amendment to have lapsed after 13 years); *id.* at 471-74 (Butler, J., dissenting) (opining that 13 years constituted an unreasonably long time). Seven years, however, has been held to be a reasonable time for states to ratify. See *Dillon*, 256 U.S. at 376.

ing is divided over its validity.⁷ If amendments do not expire after even a *very* long time, then Article V may be the Constitution's most antidemocratic provision by allowing for fundamental governmental change that is not based on a broad, contemporary consensus of the people.⁸ In addition to the amendment that would entrench slavery, at least five other pending amendments would forever haunt this nation.⁹

Finally, consider the issue of who should deliver an amendment that has successfully come to term—who should be responsible for declaring that an amendment has officially passed into law. If amendments can take centuries to ratify, this suggests the necessity for institutional record keeping and announcement. Courts and commentators have stated that this responsibility is committed to Congress alone.¹⁰ Article V, however, does not textually commit the duty of promulgation to Congress¹¹ for good reason: the institution proposing an amendment should not also have the power to declare its cause to be victorious. Such a result clashes with the Framers' intent that the amending process operate to prevent self-dealing by federal officials.¹² Presidents seemingly have always wanted a role in the amending process,¹³ but Article V does not mention the executive branch, and for good reason. The role of the executive is best suited to faithfully executing laws, not judging their validity. If the President does not have constitutional power to decline to spend allocated

7. See Bernstein, *supra* note 4, at 542-43.

8. Cf. *Dillon*, 256 U.S. at 375 (stating that a contemporary consensus should support adopted constitutional provisions).

9. Congress has proposed five additional amendments that have not received the requisite number of ratifications. See RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 301-03 (1993). These amendments involve reapportionment (proposed by Congress in 1789), titles of nobility (1810), regulation of child labor (1924), gender equality (1972), and District of Columbia statehood (1978). See *id.*

10. In *Goldwater v. Carter*, 444 U.S. 996 (1979), four Justices reiterated the principle that questions concerning the amending process constitute a political question best left to congressional resolution. See *id.* at 1002-03 & n.2. Similarly, in the academic community, the "congressional promulgation" model for the resolution of amendment process disputes has dominated discussion of Article V." Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 388 n.8 (1983).

11. The Constitution simply states that amendments are valid "when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof." See *infra* text accompanying note 26 (presenting Article V entirely).

12. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 460 (1994) [hereinafter Amar, *Consent*].

13. See *infra* Part III.C (discussing efforts by various presidents to participate in amending process).

funds,¹⁴ that is all the more reason that the executive should not have discretion to declare the validity of a questionable amendment. As with the executive branch, Article V makes no mention of the third coordinate branch, the judiciary. The prospect of five people striking down the product of congressional and state supermajorities also appears extremely antidemocratic. Of course, the states are a fourth possibility. But one can imagine Madison's fears of factional strife materializing if states perform the record-keeping function, especially if the amendment is one which galvanizes regional differences.¹⁵

The metaphorical language of gestation and birth aptly suits the amendment process, not to reify or anthropomorphize, but because amendments breathe new life into an aging Constitution. In order to prepare for the arrival of future amendments, we need to answer these questions.¹⁶ Otherwise, divisive partisan politics may continue to beset us well beyond the period of congressional proposal and state ratification and an amendment's procedural legitimacy may forever remain contested. Although the Framers seem not to have anticipated these three issues, they certainly did not intend that an amendment's fate ultimately be determined by a simple congressional majority after an uncertain and tumultuous ratification process.¹⁷ Therefore, this Article suggests that the three fundamental principles organizing our republican government—federalism, separation of powers, and popular sovereignty—provide a coherent, constitutional approach for resolving the problems of rescission, expiration, and promulgation of amendments. This Article discusses each of these ques-

14. See *Local 2677 v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

15. Indeed, it is not difficult to imagine regional politics playing a decisive role in the amending process. Consider Professor Grimes's categorization of amendments by the regional interests they served to further. See generally ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* at vii, 26 (1978) (classifying the amendments as follows: Southern, Northern, Western, Transition, and Urban).

16. See Dellinger, *supra* note 10, at 387 ("Substantial doubt about whether amendments had properly been adopted would be a matter of serious concern: it would leave us without an agreed-upon text to serve as the basic reference point from which to assess the legitimacy of government and its actions.").

17. The Framers thought that they were providing for an "easy, regular and Constitutional way" of ratifying amendments. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 202-03 (1987) (Max Farrand ed., rev. ed. 1966) [hereinafter *FARRAND, RECORDS*]. See also *THE FEDERALIST* No. 85 at 524-25 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Questions of rescission, expiration, and congressional promulgation did not arise during the Framers' lifetimes. See Letter from John M. Harmon, Assistant Attorney General to Robert J. Lipshutz, Counsel to the President, reprinted in *FREEDMAN & NAUGHTON*, *supra* note 2, at 40-41 (noting that the issue of rescission of earlier ratification did not arise until 1868 with the Thirteenth Amendment, even though the issue of ratification after rejection arose in 1789 and 1791).

tions separately. Part I of this Article concerns the issue of rescission, beginning with an examination of the fundamental principle of popular sovereignty. The people of this nation have the perpetual right to alter or abolish the Constitution. In doing so, however, the people must comply with the legal methods of change mandated by Article V by acting through their state legislatures in calling for or ratifying an amendment. States act as barometers of popular support for an amendment by ensuring that sufficient consensus exists to support a fundamental governmental change. When participating in the process of amending the Constitution, states perform a federal function that essentially makes them a temporary fourth branch of the federal government. In this rearrangement of the usual federal hierarchy, neither Congress nor any other coordinate branch—as a matter of separation of powers—may confer or constrain the power of states to act on an amendment. The Constitution alone governs states' capacities to act. Ultimately, neither the Constitution nor its inherent principle of popular sovereignty denies states the ability to reconsider their previous actions regarding an amendment if doing so will better reflect the will of its people.

Next, Part II of this Article examines the implication of the principle of separation of powers—as opposed to the principle of federalism which normally governs the state/central government relationship—in the context of the expiration of proposed amendments. Indisputably, one federal branch may not circumscribe the power textually committed by the Constitution to another coordinate branch. Absent a limitations period originated and incorporated by Congress into a proposed amendment, no federal branch may declare an amendment invalid because the states have been either too slow or too quick to ratify. This means that at least five unratified, but still pending amendments, will continue to linger because they were proposed without a time limitation. But these amendments will be prevented from inexorably creeping toward validity if states are given the power to rescind their earlier ratification.

Lastly, Part III of this Article considers the question of who should deliver a newborn amendment. The question is discussed in light of the separation of powers relationship between the federal government and the states. No further action—such as an official promulgation or declaration by Congress or an executive proclamation—is necessary after the ratification of an amendment by the last of the requisite three-quarters of the states. Instead, promulgation or proclamation usurps the power of states to determine the outcome and

speed of the process by individually deciding to reject, ratify, or rescind. However, this is not to say that states should be the ones to declare an amendment law, because that would invite regional conflict.¹⁸ Rather, any doubt about the procedural propriety or sufficiency of a putative amendment should be resolved by the judiciary. Because substantive challenges to an amendment's content cannot be heard, the courts would merely umpire the rules of the game. Thus any defects in the ratification process could be cured.

I. May a State Rescind Its Earlier Ratification of a Pending Amendment?

A. Sovereignty and Primary Authority in the Amending Process

The people of the United States have the collective right to alter or abolish the Constitution because the Constitution derives its legitimacy from the consent of the governed alone. Accordingly, each generation of the electorate possesses no less political authority than did the electorate which ratified the original Constitution. During the Philadelphia convention, Madison affirmed—as a matter of first principle—the prerogative of the people to alter or abolish their government: “The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights, [sic] that first principles might be resorted to.”¹⁹ Article V, which expressly recognizes the majoritarian right to make amendments to the Constitution, provides that all amendments be ratified by the states acting on behalf of their residents.

Although Article V provides for constitutional amendments, it offers only the barest of guidance on the amendment process. During the Philadelphia convention, Madison realized that the single sentence addressing amendments would be insufficient to guide the amending process.²⁰ Thus, he raised the point “that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible be avoided.”²¹ Ultimately, the Framers left behind enough evidence of their intent for the amendment process to be launched, but not enough to answer several basic questions about the ratification process. These questions concern how the amending

18. See *supra* note 15 (noting Professor Grimes's categorization of amendments).

19. 2 FARRAND, RECORDS, *supra* note 17, at 476.

20. Indeed, the whole of Article V comprises a single, albeit long, sentence of fewer than 150 words. See *infra* text accompanying note 26 (presenting Article V entirely).

21. 2 FARRAND, RECORDS, *supra* note 17, at 630.

process should function, rather than whether or when the Constitution may be amended.

Questions about how the amending process should work must be answered in faithful accordance with Article V. While the people and their representatives may act to change or abolish the Constitution, they must comply with the Constitution even while acting to change it.²² On this point, Alexander Hamilton was adamant: the power to amend the Constitution does not include the right to ignore it. In *Federalist No. 78*, he wrote: "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it prior, to such an act."²³ The process of constitutional change must itself be constitutional. Even though each individual has inalienable political agency, no one is above the law as "it is binding" on the people "individually." Indeed, in changing the Constitution, the people must act collectively because the right to alter or abolish the Constitution is a majoritarian right.

This majoritarian right must be exercised in the collective mode that James Wilson called "essential to every system of wise, good, and efficient government" through the elected representatives of the people.²⁴ Indeed, according to the dictates of Article V, the people cannot by themselves act to amend the Constitution. As with most determinations directly affecting the federal government, the Constitution avails itself of representative democracy in the amending process.²⁵

22. But see Bruce A. Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 1, at 73-74; Amar, *Consent*, *supra* note 12, at 459-60 (arguing that Article V does not deny American electorate power to directly amend Constitution because amending process constraints operate only to prevent self-dealing by governmental officials). While I disagree with arguments that Article V does not govern the amending process if the people themselves act, the possibility of direct constitutional amendment has no bearing on whether states may reverse an earlier vote on an amendment pending ratification. Whatever the constraints on the people themselves, Article V indisputably constrains the process when the federal and state officials act to amend.

23. *THE FEDERALIST NO. 78*, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. James Wilson's Opening Address in Pennsylvania Ratifying Convention (Nov. 24, 1787), in 1 *THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION* 795 (Bernard Bailyn ed., 1993) [hereinafter *DEBATE*].

25. See U.S. CONST. art. II, § 1, cls. 2-4 (electoral college and election of the president); U.S. CONST. art. I, § 3, cl. 1 (original provision for election of senators by state legislators), *amended by* U.S. CONST. amend. XVII, §1; U.S. CONST. art. II, § 2, cl. 2 (ap-

Note that Article V authorizes four actors to participate in the process of amending the Constitution: Congress, state legislatures, constitutional conventions called for purposes of proposing an amendment, and state ratifying conventions.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.²⁶

Article V does not mention the President, executive branch officials, the Judiciary, state governors, or even citizens themselves.²⁷ Of course, the omitted parties will have great influence in the process, but they are nonetheless not the designated actors for purposes of Article V constitutional requisites.²⁸

pointment of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States").

26. U.S. CONST. art. V.

27. During the Philadelphia convention, George Mason noted his objection to the omission of the people from a direct role in the amending process:

Article 5th. By this Article Congress only have the Power of proposing Amendments at any future time to this Constitution, & shou'd it prove ever so oppressive, the whole people of America can't make, or even propose Alterations to it; a Doctrine utterly subversive of the fundamental Principles of Rights & Liberties of the people.

George Mason, *Suggested Revisions of Committee of Style Report*, reprinted in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 270 (James H. Hutson ed., 1987) [hereinafter FARRAND, SUPPLEMENT]. Mason's statement suggests that the other delegates were both aware that the American electorate would have to act through representation in amending and that the delegates supported this plan.

28. "In the American experience, however, even though the people have been referred to as the source of all political power, the creation of a written constitution shifted the ultimate lawmaking powers from the people, as a whole, and spread it among the various branches of government." *Idaho v. Freeman*, 529 F. Supp. 1107, 1127 (D. Idaho 1981), *vacated as moot sub nom. NOW v. Idaho*, 459 U.S. 809 (1982).

B. The Nature of the Role of States in the Ratification Process

1. *States as Barometers of Popular Support for a Specific Proposal*

The omission of the American electorate from an express Article V role does not mean that the Framers failed to include the people in the amending process. Rather, the Framers' statements indicate that they brought the amending process as close to the people as practicable by requiring action at the state level. The states serve as barometers of public support for the particular amendment in the ratification process. That the Framers intended to resort to the people for approval of constitutional changes is evidenced in Hamilton's assertion, made during the Philadelphia convention, that "[t]here could be no danger in giving this power, as the people would finally decide in the case."²⁹ Even though the states were the designated actors, the Framers understood that the will of the people should ultimately decide questions of amendments.

Even James Wilson—who had favored direct election of senators by the people instead of by state legislatures—declared that although the state tallies would be determinative, the amending process under Article V availed itself of the consent of the people. Specifically, in the Pennsylvania Ratifying Convention, Wilson stated:

The truth is, and it is a leading principle in this system, that not the states only, but the people also shall be represented. And if this is a crime, I confess, the general government is changeable with it; but I have no idea, that a safe system power, in the government, sufficient to manage the general interest of the United States, could be drawn from any other source, or rested in any other authority than that of the people at large, and I consider this authority as the rock on which this structure will stand.³⁰

Indeed, the Constitution acknowledges from the outset that it derives its authority from the people themselves. The Preamble declares that "THE PEOPLE of the United States . . . establish this Constitution for the United States of America."³¹ That the Constitution specified that "[t]he Ratification of the Conventions of nine States, shall be suffi-

29. 2 FARRAND, RECORDS, *supra* note 17, at 558. When Hamilton rose to speak on this point, the allocation of the power to propose amendments to states alone provided in the Virginia plan remained the prevailing proposal for amendments. The Virginia plan stated that "provision ought to be made for the amendment of the Articles of Union whenever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." 1 FARRAND, RECORDS, *supra* note 17, at 22; *see also* EDWARD DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 433 (1964).

30. James Wilson's Opening Address in Pennsylvania Ratifying Convention (Nov. 24, 1787), in 1 DEBATE, *supra* note 24, at 821; *see also* 1 *id.* at 801-02.

31. U.S. CONST. preamble.

cient for the Establishment”³² of the new form of government in no way disparaged the sovereignty of the collective people or the veracity of the Preamble. The method of ratifying the Constitution, and the method of ratifying constitutional amendments, have availed themselves of representatives of the people of the several states.

Referring to the Preamble, James Wilson explained to the Pennsylvania ratifying convention the role of those whose duty has involved voting on a constitutional issue at the state level:

I think that the force of the introduction to the work, must by this time have been felt. It is not an unmeaning flourish. The expressions declare, in a practical manner, the principle of this constitution. It is ordained and established by the people themselves; and we [the members of the Pennsylvania Ratifying Convention] who give our votes for it, are merely the proxies of our constituents. We sign it as their attorneys, and as to ourselves, we agree to it as individuals.³³

Both the Preamble and Article V articulate a form of government that derives its authority from the people through the actions of state constitutional conventions or legislatures.³⁴ This is the essence of representative democracy that underpins the United States.

Although the Framers may have submitted presidential elections and amendment ratifications directly to the people had the enabling communicative and transportation technologies existed,³⁵ states were ultimately chosen and remain the determinative unit for amendment

32. U.S. CONST. art. VII.

33. James Wilson's Summation and Final Rebuttal in Pennsylvania Ratifying Convention (Dec. 11, 1787), in 1 *DEBATE* *supra* note 24, at 837.

34. Madison explained the dual role of the people in the founding of the United States as having federal and national functions:

[I]t appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong.

THE FEDERALIST NO. 39, at 243 (James Madison) (Clinton Rossiter ed., 1961). Even though states are no longer independent sovereignties, the federal organization of the United States preserves the viability of Madison's explanation for the method of approving constitutional amendments.

35. Compare Speech of James Wilson in the Philadelphia Ratifying Convention, in 1 *DEBATE*, *supra* note 24, at 846 (“[A]ll the people of the same society ought to meet in one place, and communicate freely with each other on the great business of representation.”), with THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.”).

ratifications.³⁶ However tempting it may be, we cannot simply ignore express constitutional constraints, but must formally and solemnly alter the Constitution before any other ratifying denominator suffices.³⁷ Otherwise, the Constitution becomes nothing more than persuasive authority.³⁸

Article V clearly denotes states as actors to gauge public support by allowing Congress to specify that special conventions within the states be called to ratify a proposed amendment.³⁹ As stated by Philadelphia convention delegate, and later Chief Justice Iredell, in the North Carolina Ratifying Convention:

Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, . . . as Congress shall think proper By referring this business to the legislatures, expense would be saved; and in general, it may be presumed, they would speak the genuine sense of the people. It may, however, on some occasions, be better to consult an immediate delegation for that special purpose. This is therefore left discretionary.⁴⁰

Congress may make this determination to bring the decision closer to the people and away from entrenched state government politics.⁴¹ Thus, in gauging the level of support for amendments, states must not be bound to a determination should it happen that a broad base evaporates.⁴² States must be able to rescind their ratifications to effect the will of its citizens.

36. Cf. *Hawke v. Smith*, 253 U.S. 230, 230 (1920) ("It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented.").

37. See JOHN R. VILE, *CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS* 129 (1992).

38. Cf. Lawrence H. Tribe, *Taking the Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-32 (1995) (critiquing approach to constitutional interpretation that departs from express textual constraints such as Article V).

39. See U.S. CONST. art. V.

40. 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 177-78 (2d ed. 1881) (statement of James Iredell before North Carolina ratifying convention on July 29, 1788); see also *United States v. Sprague*, 282 U.S. 716, 732 (1931); *Idaho v. Freeman*, 529 F. Supp. 1107, 1132 (D. Idaho 1981), *vacated as moot sub nom. NOW v. Idaho*, 459 U.S. 809 (1982).

41. The Twenty-First Amendment illustrates this option, being the only amendment that was ratified by state conventions rather than state legislatures.

42. See *Freeman*, 529 F. Supp. at 1148 ("All of the cases which have considered Article V have reaffirmed the vision of the founding fathers that the essential democratic value of

2. *State Legislatures and Ratifying Conventions Perform a Federal Function*

In performing the amendment ratifying function, state governments act in a federal capacity.⁴³ Thus, separation of powers concerns must govern the allocation of the balance of powers between Congress and the ratifying states. Congress may not trump—what is for ratification process purposes—a coordinate branch. States may not be denied the power to act by Congress. Neither the Constitution nor its implicit separation of powers foundation support such a result.

The Constitution reorganizes the usual federal hierarchy to ensure that Congress may not lord over state actions under the normally governing Supremacy Clause.⁴⁴ In case of amendments to the Federal Constitution, any power of Congress that holds states to their initial ratification actions would flout the consent of the governed, that is, the represented people of rescinding states.⁴⁵ Remember that it is not the states acting on the residuum of their sovereign capacities, but in their federal role of ascertaining the base of census for decisions affecting the central government. Thus, the authority of Congress under the Supremacy Clause does not apply to what is essentially a temporary fourth branch of the federal government: states in their ratifying capacity.⁴⁶

C. Rescission and the Text of Article V—Three Possibilities

Based upon the provision in Article V that an amendment becomes part of the Constitution “when ratified” by three-quarters of states, numerous commentators have concluded that a state may not rescind its earlier ratification of a proposed amendment.⁴⁷ Nonetheless, most commentators acknowledge that this phrase lends itself to three plausible interpretations. The most popular interpretation has

the will of the people be inextricably linked with the state’s action in considering ratification.”).

43. See *Leser v. Garnett*, 258 U.S. 130, 136-37 (1922); see also *Dyer v. Blair*, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975).

44. In contrast to the usual Article I legislation requirements of origination and presentment, Article V legislation is extraordinary in the sense that legislation need not originate in Congress—but also with the states—and presentment is not to the President, but the state legislatures or special conventions. In this sense, Congress is a coordinate branch with the states collectively, just as Congress is coequal with the President in the usual mode of legislating. Thus, states perform a federal function in the ratification process.

45. See *Freeman*, 529 F. Supp. at 1148.

46. See *infra* Part III.A (arguing that Congress cannot have plenary authority over the amending process if federal self-dealing is to be checked by Article V).

47. See *supra* text accompanying note 26 (presenting Article V entirely).

been that while an initial state rejection of an amendment is not conclusive, a ratification is both effective and final. Another interpretation has been that a state's initial action either rejecting or ratifying an amendment is final and may not be reconsidered. The third possibility is that neither a state's rejection nor ratification is final until the requisite three-quarters of states unequivocally ratify, at which point all state actions are conclusive.

In contrast to the general agreement on the three interpretive possibilities, scholars have divided as to the correct approach.⁴⁸ Furthermore, conflicting approaches have been adopted even within the existing case law. Finally, strategic considerations have contributed as much to the dialogue as textual fidelity to the Constitution because much of the commentary on the subject has been written either by proponents or opponents of a particular amendment.

1. *Initial Rejections Null, Ratifications Conclusive*

Understandably, the idea that Article V allows states to reconsider earlier rejections, but not earlier amendment ratifications, has been the most popular in literature discussing the subject.⁴⁹ In addition to scholarly approval, this approach has been followed by Congress and executive officials as to amendments that have raised the issue. Further, this approach has a purported venerable pedigree because it was adopted when the issue of attempted rescissions and ratifications despite earlier rejections first arose with the ratification of the Fourteenth Amendment.

The Fourteenth Amendment's problematic ratification by five states perplexed Secretary of State Seward, whose duty it was to certify amendments upon receiving approval of the requisite three-

48. One theoretical possibility—that states may rescind after ratifying, but not ratify after an initial rejection—seems not to have any authority in support.

49. See Lynn A. Fishel, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Rights Amendment*, 49 IND. L.J. 147, 147 (1973) (noting that this interpretation represents the "conventional assumption"). Apparently, this argument was first made by Governor Bramlette of Kentucky during the pendency of the Thirteenth Amendment. Speaking to the Kentucky state legislature, he stated: "Rejection by the present Legislative Assembly only remits the question to the people and the succeeding Legislature. . . . Nothing but ratification forecloses the right of action. When ratified, all power is expended. Until ratified, the right to ratify remains . . ." 1865 Ky. Acts 1, reprinted in Note, *Constitutional Law—Amendment of United States Constitution—Ratification—Power of Judiciary to Pass upon Validity*, 24 MINN. L. REV. 393, 395 n.12 (1940). The subsequent widespread acceptance of this argument is attributable to Jameson's treatise on constitutional law. See *id.*

quarters of states.⁵⁰ Three states, North Carolina, South Carolina, and Georgia, had ratified despite their earlier rejections of the amendment while Confederate governments were still in charge. Further, two states, New Jersey and Ohio, had voted to rescind their earlier ratifications. Seward decided to issue the certificate and appended a list of ratifying states that included these five. Almost immediately, Congress passed a concurrent resolution that the Amendment be ratified.⁵¹ In promulgating the Amendment, the congressional Republican agenda was more controlling than required by textual fidelity to the Constitution: "Congress' action with respect to the fourteenth amendment [sic] is perhaps the most notable example of a purely political determination of an amendment controversy."⁵² Despite the politically expedient origin of this approach to ratifications, its defenders note that Congress and the executive branch have not deviated from it, but affirmed it in promulgating the Fourteenth, Fifteenth, and Nineteenth Amendments.⁵³

Precedent, however, holds none of the *stare decisis* value in compelling continued application in Congress as it does in the courts because no session of Congress can bind a future session. Nonetheless, numerous commentators have harped on this congressional precedent as authoritative.⁵⁴ Ultimately, reliance on congressional precedent "attempts to bind successor Congresses to vote in a certain way on controverted questions of constitutionality and policy, a thing which,

50. Before Congress designated a legislative branch official in 1818, it used to be a function of this executive branch official to certify amendments to be ratified. See 1 U.S.C. § 106(b) (1984) (instructing Archivist of United States to "cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States"); Dellinger, *supra* note 10, at 400-03. This statute has not, however, eliminated problems of a baffled unelected official making a critical decision on ratification that Congress feels constrained to follow. See Bernstein, *supra* note 4, at 540-41 (noting congressional consternation with Archivist of the United States Don W. Wilson's decision to certify the Twenty-Seventh Amendment after 202 year gestation).

51. See Proclamations of July 20 & July 28, 1868, 15 Stat. 706, 708.

52. Yvonne B. Burke, *Validity of Attempts to Rescind Ratification of the Equal Rights Amendment*, 8 U. WEST L.A. L. REV. 1, 3 (1976).

53. See, e.g., FREEDMAN & NAUGHTON, *supra* note 2, at 19 ("Historical precedent, therefore, overwhelmingly tips the scales in opposition to rescission. . . . While Congress need not exhibit rigid consistency, it has nonetheless attempted over the years to assure the nation of some stability and rational predictability in its decision-making process—if only to maintain its own credibility. Congressional history, then, can be taken as a reasonably reliable guide to future action on the legality of rescission . . .").

54. See Burke, *supra* note 52, at 3; W.F. Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321 (1921); Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979, 1001 (1977); Note, *supra* note 49, at 395-96.

on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do."⁵⁵

Even the Supreme Court has countenanced the approach of letting congressional precedent settle ratification controversies. In *Coleman v. Miller*,⁵⁶ the Court issued four separate opinions because no single point gained a majority. Nonetheless, the decision has come to stand for the proposition that Congress alone determines when amendments have validly been ratified.⁵⁷ By default, the Court upheld the idea that states may ratify after rejecting an amendment, but may not rescind after ratifying. In short, judicial abdication, partisan congressional pronouncements, and shaky executive branch certifications constitute the only guidance on the ratification controversy available from the federal government.

This dearth of contradictory authority from federal officials has spurred a return to the ultimate federal authority—the Framers' intent on the subject of ratifications and rescissions. In an influential work, Professor David Watson argued that the Framers, Madison especially, asserted that a state may not rescind its ratification of an amendment.⁵⁸ Watson contended that "Madison's expression that the Constitution requires an adoption *in toto* and *forever* shows his opinion was that affirmative action having once been exercised by the legislature, it must stand for all time and could not be affected by any subsequent legislation."⁵⁹ To prove this point Watson, as well as other more recent authors, have uncritically cited the following passage from Madison's July 1788 letter to Alexander Hamilton:⁶⁰

My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitu-

55. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189, 191 (1972); see also Fishel, *supra* note 49, at 154.

56. 307 U.S. 433 (1939).

57. See Note, *supra* note 49, at 398 (stating that *Coleman v. Miller* "decided that the Court lacked the power to decide those questions [about the amending process] because they are essentially political and not subject to judicial determination"). Although *Coleman v. Miller* has come to stand for this proposition, the decision itself does not so hold. In the "opinion of the Court," which secured the votes of Justices Hughes, Stone, and Reed, the Chief Justice wrote: "Whether [plaintiff's] contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point." *Coleman*, 307 U.S. at 447.

58. See 2 DAVID K. WATSON, *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION AND CONSTRUCTION* 1314-17 (1910). Watson's argument has been uncritically accepted and relied upon. See, e.g., FREEDMAN & NAUGHTON, *supra* note 2, at 40; Kanowitz & Klinger, *supra* note 54, at 1002.

59. WATSON, *supra* note 58, at 1317.

60. See, e.g., Kanowitz & Klinger, *supra* note 54, at 1002.

tion within a certain time is a *conditional* ratification; that it does not make New York a member of the Union, and consequently that she could not be received on that plan. Compacts must be reciprocal—this principle would not in such a case be preserved. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any *condition* what ever must vitiate the ratification.⁶¹

Reliance on this quote, however, to support the power of states to rescind their ratifications of pending amendments to an extant Constitution is misplaced. Madison asserted that any attempt by a state to enter the union on a conditional basis must fail because becoming part of our federal republic, which is not a mere league of states bound by international treaty, compels states to surrender their sovereignty.⁶² However, Madison did not assert, as Watson contends, that states are bound by their ratifications of proposed amendments once the Constitution has unequivocally been adopted. Moreover, Madison certainly did not universally deny the power of states to ever reverse themselves on actions upon the federal government. At most, we can derive a rule that a state cannot conditionally ratify an amendment to the Constitution.⁶³ Even this, however, does not necessarily follow from the express terms of Madison's letter.

More credible efforts to affirm the power of the states only to ratify amendments have relied upon the word choice employed in Article V, which states that amendments "shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof"⁶⁴ Noting that Article V affirms the power of states to ratify, but does not mention rescission or rejection, support-

61. Letter from James Madison to Alexander Hamilton (July 1788), *reprinted in* 2 WATSON, *supra* note 58, at 1317.

62. See Amar, *Consent*, *supra* note 12, at 465 ("The Articles of Confederation were nothing more than a tight treaty among thirteen otherwise independent states—a self-described 'firm league of friendship' in which each state expressly 'retains its sovereignty.'"). Contrast the "treaty" nature of the United States under the Articles with the union of a United States under the Constitution.

63. An example of an impermissible condition would be if a state conditioned its ratification on congressional approval of increased highway funds for that state within the next two fiscal years. Such contingent or strings-attached ratification of amendments was rejected, albeit in dicta, by the court in *Idaho v. Freeman*, 529 F. Supp. 1107, 1154 (D. Idaho 1981), *vacated as moot sub nom.* NOW v. Idaho, 459 U.S. 809 (1982).

Whether a state's imposition of a time deadline in its ratification of an amendment would similarly be impermissible is considered below. See *infra* Part II.C.2.

64. U.S. CONST. art. V.

ers of this argument point to congressional treatment of the Fourteenth Amendment, which followed "the plain meaning" of the Constitution.⁶⁵ This has been characterized as "positive power" to ratify.⁶⁶ In *Coleman v. Miller*, the Kansas Supreme Court declared that the Constitution grants only a positive power to ratify.⁶⁷ The United States Supreme Court's ultimate disposition of the case, in effect, left the Kansas high court's decision standing.⁶⁸

Only rarely, however, do governing bodies possess only a positive power to act on pending legislation; a negative vote being inconsequential. Indeed, the sole example that commentators have proffered involves the action of a municipality in either approving or rejecting a bond measure.⁶⁹ Yet, while the municipal bond situation strays from

65. See Fishel, *supra* note 49, at 149 n.10 (collecting authority).

66. This argument holds that a state's ratification exhausts its power with respect to the amendment ratified. See LESTER B. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 71 (1942); Kanowitz & Klinger, *supra* note 54, at 1005; Daniel Norman Stevens, Comment, *Constitutional Law—Ratification of Proposed Federal Amendment After Prior Rejection*, 11 S. CAL. L. REV. 472 (1938). Surprisingly, Professor Dellinger may also support this position on grounds of efficiency and certainty.

67. 71 P.2d 518 (Kan. 1937), *aff'd* 307 U.S. 433 (1938).

68. In fact, the U.S. Supreme Court's disposition of the *Coleman* case seems to have confounded the Justices who wrote it as much as those who have had to read and make sense of it. For example, Sam J. Ervin, Jr. has pointed out that "Chief Justice Hughes did not reveal the mystery of how nine or five Justices could be 'equally divided' on a constitutional question." 2 FREEDMAN & NAUGHTON, *supra* note 2, at 86 (recounting statement of Senator Sam J. Ervin, Jr.). One commentator has noted that the decision was delayed for several months because "[a]t that time the Court had only eight members, no successor to Mr. Justice Cardozo having been appointed, and it was believed that they were equally divided on the question of jurisdiction." Noel T. Dowling, *Clarifying the Amending Process*, 1 WASH. & LEE L. REV. 215, 215 (1940). But this still leaves the mystery of how Chief Justice Hughes delivered the opinion of the Court with only Justices Stone and Reed concurring.

69. The purported exception involves municipal corporations. See Stevens, *supra* note 66, at 472 n.5 (quoting COOLEY, *CONSTITUTIONAL LAW* 257 (4th ed. 1931)).

Where by statute a municipality is permitted, with the consent of the majority of its electors, to raise exceptional taxes or assume exceptional burdens, an election once held which results in a favorable vote is conclusive. If, however, the first election results in a majority against the proposal, and there is nothing in the law which negatives the right to vote again, the case stands as if no election had been had, and the sense of the people may be taken again and again, and a favorable vote at the last election is as effectual as if it had been obtained at first.

Id. Although this is an exception to the general rule that a governing body may not reverse its action on an earlier determination, the example is nonetheless inapposite here. A ratifying state casts but one "vote" on pending Article V-type legislation. It is indisputable that a representative—here a state rather than just an individual representative—may change its vote before the final tally. See CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS § 511, at 256 (U.S. Gov. Printing Office 1993) (noting authority, in *Jefferson's Manual*, providing that member may change his vote); *id.* § 766, at 537 (providing, in

the rule that a governing body may always reverse an earlier action, this example is inapposite to state ratifications in the amending process. A state in the amending process constitutes one of the requisite votes on pending legislation—amendments being legislation, albeit not the usual Article I type. Just as a voting member of a municipality may reverse his or her vote before a requisite majority adopts the measure, so too may states reverse their votes prior to final ratification by three-quarters of the states.

As plausible as this *prima facie* interpretation of the literal language of Article V appears, it requires disregarding the history and role of states in the constitutional scheme and tends to make the whole process less deliberate and efficient.⁷⁰ The amending process becomes less deliberate because citizens in states that have already ratified no longer possess the power to act on that amendment—they become politically estopped. For fear of losing a participatory role in the amending process on a particular topic, citizens of the several states would be wiser to wait, in an excess of caution, than to ratify, in an excess of haste. The impetus would be to slow the amending process.

2. *Initial State Action Final—Whether Rejection or Ratification*

Even more so than the first construction of Article V's "when ratified" requisite, the second possibility—that a state's initial action in the amending process, whether rejection or ratification, is final—would curtail political dialogue and the efficiency of the ratification process. As a result, states would need to exercise extreme caution when acting on a pending amendment because whatever the decision adopted—yea or nay—would forever bind the people of that state. This construction of Article V raises the possibility that once considered in the state legislature, or special convention, a failure to ratify the amendment would be tantamount to a rejection of the proposal. Thus, bodies convened for purposes of ratifying an amendment may be delayed in order to gauge the response of other states or may alternatively remain in session under the fiction that the legislative day has no relation to the Julian day. In either case, constraining the people of a state to forever abide with the initial determination of either the

House Manual, that "[b]efore the result of a vote has been finally and conclusively pronounced by the Chair, but not thereafter, a Member may change his vote, and a Member who has answered "present" may change it to "yea" or "nay") (citations omitted).

70. Cf. ORFIELD, *supra* note 66, at 71.

state legislature or the special convention cannot make for "an easy, regular and constitutional amending process."⁷¹

Nonetheless, this second possible construction of the power of states to ratify the Constitution avails itself of greater logical consistency and fairness to the proposed amendment's opponents than the first construction, which denies all but the positive power to ratify. Professor Orfield, in an excellent treatise on constitutional construction, noted that "treating both acceptance and rejection as conclusive is logically consistent and insures protection of minority rights."⁷² Treating rejection, or acceptance and rejection, as binding in the first instance prevents the weighting of the amending process in favor of proponents of the pending amendment. If ratifications count but rejections do not, then those who favor the pending amendment may try ad infinitum to secure ratification. Nothing would prevent proponents from continued lobbying in favor of ratification; at which point they could rest secure with the knowledge that even if a majority comes to oppose the amendment, that ratification cannot be reversed. But, opponents of a pending amendment—though they constitute the plurality with respect to proponents and the undecided—would need to continue their efforts so long as the amendment pends. Even if the state legislature or special convention rejected the amendment several times, opponents of the measure could not avail themselves of the same finality benefiting the proponents. In short, treating the initial state determination as conclusive prevents the amending process from becoming a one-way ratchet providing unfair advantage to proponents of amendments.

Further support for the finality of the initial state action in considering whether to ratify pending amendments has been found in construing Article V to provide states only the very limited power to consider a pending amendment.⁷³ Supreme Court precedent in support of this position can be found in the curious case of *Chandler v. Wise*,⁷⁴ which reached a different result than its companion case *Coleman v. Miller*.⁷⁵ The Supreme Court's result in *Chandler*, however, offers very weak support for the position that the initial state action

71. See FARRAND, RECORDS, *supra* note 17, at 203 (recounting statement of Col. Mason).

72. ORFIELD, *supra* note 66, at 70-72; accord Stevens, *supra* note 66, at 472.

73. See Cadawalder, *Amendment of the Federal Constitution*, 60 AM. U. L. REV. 389, 393 (1926); Frank W. Grinnell, A "Point of Order" on the Child Control Amendment, 20 A.B.A. J. 448 (1934).

74. 307 U.S. 474 (1939).

75. 307 U.S. 433 (1939).

on a pending amendment is conclusive. By vacating the case as moot, the Court let stand the decision of the Kansas high court, which held that the initial state rejection of the child labor amendment was conclusive.⁷⁶ More than an implicit affirmation of the holding of the lower court, the Supreme Court reached its result because a majority believed that the Court's abstention was mandated by the political nature of the controversy. One commentator, writing shortly after *Coleman* and *Chandler* were handed down, noted the Court's difficulties with the amending process: "Illustrative of the uncertainty surrounding the question as to whether or not a legislature may change its action with respect to a proposed federal amendment . . . are two recent decisions arriving at contrary conclusions."⁷⁷ Accordingly, as numerous scholars have noted, the Court's apparent support of the lower court's adoption of this second possible construction of Article V's "when ratified" phrasing in *Chandler* constitutes a default of thoughtfulness with respect to the amending process that has yet to be overcome.⁷⁸

A thoughtful analysis of Article V's provision that an amendment becomes valid "when ratified" by three-quarters of states must comport with the accountability to the people that the Framers clearly intended for the ratification process. Imagine that within each of the thirteen smallest states—which would constitute more than a quarter of the fifty extant states—a thin majority opposes an amendment and prevails to quickly reject this proposed amendment. If initial actions on ratified amendments are conclusive, then these small state majorities, comprising only $X\%$ of the total population of the United States, can prevent the remaining $100-X\%$ of Americans from even considering that proposal.⁷⁹ The door would be shut to meaningful political dialogue that the Framers considered essential for proper consideration of issues directly affecting the federal government. Moreover, no opportunity for correction of potentially incorrect assumptions or changing initial opinions of the people would be possible. One can imagine that opponents of an amendment would quickly flock to the

76. See Burke, *supra* note 52, at 3.

77. Stevens, *supra* note 66, at 472.

78. See Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 519-20 (1994); see also Note, *supra* note 49, at 404.

79. The combined population of the smallest 13 states is roughly 11 million, compared to the 260 million total population of the United States as a whole. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 28-29. Thus, about six million Americans—constituting a majority in each of the smallest 13 states—can theoretically prevent ratification of an amendment according to Article V.

thirteen smallest states—much as presidential hopefuls flock to New Hampshire early in the election process—in an attempt to secure their agenda by early lobbying of a tiny fraction of the nation's population. Such a focus would be the antithesis of the sort of discussion and broad support that a proposed amendment should receive under Article V.

3. "When Ratified" as Referring to Requisite States in Agreement

The approach that provides for the greatest amount of dialogue and political agency is one that allows for reconsideration of both rejections and ratifications of pending amendments. Yet, this approach has been rejected exactly on these grounds by numerous commentators who have feared its impracticality insofar as it would create an administrative nightmare in keeping track of which states have unequivocally ratified. Essentially, this line of objections assumes that convenience and efficiency inhere in the democratic process of our constitutional government, especially in the process of amending the Constitution according to Article V. This third approach has also been dismissed as a "lottery theory,"⁸⁰ for which there is "little support."⁸¹ The image of a lottery is intended to conjure an image that the outcome depends on the final draw of state ratifications and rejections. Underlying this objection is an assumption that vagaries of chaotic state actions in ratifying and reversing will essentially make the outcome of the amending process a gamble. A final series of objections to this third approach to rejections and rescissions involves the contention that proponents of an amendment will be unable to formulate a coherent strategy for securing passage if every state's assent remains subject to change.⁸² Each of these objections ultimately incorporate an assumption that runs contrary to the premises underlying representative democratic action. As Professor Orfield has noted, Article V should democratically change a democracy:

80. Fishel, *supra* note 49, at 149.

81. Burke, *supra* note 52, at 3. *But see, e.g.,* FREEDMAN & NAUGHTON, *supra* note 2, at 100-01 (statement of Professor Charles L. Black, Jr.); Justin Miller, *Amendment of the Federal Constitution: Should It Be Made More Difficult?*, 10 MINN. L. REV. 185, 188 (1926); Lester B. Orfield, *The Federal Amending Power*, 25 ILL. L. REV. 418, 419 (1930); Note, *Constitutional Law—Amendments—Power of a State to Ratify an Amendment After Previously Rejecting It*, 22 MINN. L. REV. 269, 270 (1938).

82. See Kanowitz & Klinger, *supra* note 54, at 1003 ("Recognition of a power of the states to rescind their ratifications would . . . create an enormous potential for tactical abuse."). These commentators, however, fail to elaborate on exactly what the abuse would be.

It is more democratic to allow the reversal of prior action. A truer picture of public opinion at the final date of ratification is obtained. No great confusion is likely to result from such a rule. Not to allow reversal of an acceptance may cause a cautious legislature not to act.⁸³

This observation has been objected to: "Orfield does not seem to comprehend the practical difficulties this proposed procedure would entail."⁸⁴ Efficiency and convenience, however, are not hallmarks of democratic government, but of tyranny. The Framers did not premise the allocation of governmental powers among coordinate federal branches, between the House of Representatives and the Senate, and between states and the central government on efficiency in government or simplicity for legislating. Instead, the process of democracy can be frustrating, time consuming, and downright inefficient.

This does not mean that the Framers intended to make passing laws as hard as possible, but that laws should not be passed without taking a hard look at them. The process is quintessentially deliberative, depending on consensus and compromise within and among governing branches. Article V represents the Framers' intention to provide for channels of deliberation that balance the need for deliberation with the need for efficiency. One of the most important features of Article V is that it allows only one version of an amendment to circulate so that the "question can be put forth singly."⁸⁵ The deliberation is to be focused on a single issue, stated in the text of a single proposal so that the existence of several competing versions, each only slightly different, does not confuse the ratification process. That polit-

83. See ORFIELD, *supra* note 66, at 72; see also *Idaho v. Freeman*, 529 F. Supp. 1107, 1149 (D. Idaho 1981), *vacated as moot sub nom. NOW v. Idaho*, 459 U.S. 809 (1982). ("This objection has little merit when it is realized that all Congress or its designate must do is count the state's most recent official certification to determine whether or not three-fourths have ratified.")

84. Fishel, *supra* note 49, at 149 n.11. Fishel does not elaborate on the "nightmares" she envisions. Similarly, Dellinger rejects this possibility as giving rise to too much uncertainty in the process. As one commentator has noted, Professor Dellinger's position on this issue yields an internally inconsistent approach to Article V. See VILE, *supra* note 37, at 47.

85. THE FEDERALIST NO. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (anticipating that "every amendment to the Constitution . . . would be a single proposition, and might be brought forth singly"). Professor Michael Paulsen, however, has noted that Congress could propose two amendments on the same subject, but reaching opposite results so that states could determine the result by ratifying the one that secures sufficiently broad support. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 700 (1993). Professor Paulsen's hypothetical is possible, albeit unlikely. Ultimately, the two conflicting amendments would still address the same issue singly, if by use of two amendments, rather than an up or down vote on a single amendment.

ical dialogue—the heart of democracy—makes the legislative process less efficient is an unacceptable justification for curtailing discussion.

Similarly, curtailing political dialogue to allow for greater certainty by estopping states that have already assented to a particular proposal disenfranchises those states' citizens and representatives from continued political agency. It would constitute the only exception to the rule that a state legislature has no power to bind a future legislature of that state. The possibility arises that entire generations of state citizens will be unable to have a say on a pending amendment by virtue of living in a state that has once ratified, if amendments do not naturally expire or expire only after a long period of time. Such political disenfranchisement cannot be justified by conferring proponents of a particular proposal the luxury of taking ratified states for granted. Whatever semblance of certainty that state estoppel on the issue of ratification confers on Article V is unimportant and does not amount to constitutional legitimacy. Legitimacy for amendments means that they unquestionably enjoy the consent of the governed by having comported with the dictates of the rules of recognition provided in the Constitution. Although a rash of last-minute reversals might attend the ratification or rejection of an amendment, this represents democracy in action rather than a lottery. Whereas a lottery depends on chance for its result, an amendment should depend on a consensus of acceptance by the American electorate. No great confusion is likely to be generated, despite assertions to the contrary.⁸⁶ Ultimately, we must distinguish between uncertainty about the process and uncertainty existing within a well-understood, accepted process. The latter is of no constitutional concern and cannot really be credible in these days of efficient communicative technologies.

Imagine that a state may not rescind its earlier ratification. Then, as a number of commentators note, some legislatures may be overly cautious in ratifying, playing a wait-and-see game that delays addressing the substantive issue of the proposal. This well-advised caution when coupled with Congress' practice of setting a ratification time limit⁸⁷ suggests that Congress may be able to exert undue influence

86. See ORFIELD, *supra* note 66, at 72; see also Josephine H. Klein, Note, *Constitutional Law—Federal Amendments—Finality of States' Action—Time Limit*, 18 B.U. L. REV. 169 (1938). But see FREEDMAN & NAUGHTON, *supra* note 2, at 18 (citing example of Nineteenth Amendment's ratification when several states vied to "gain the distinction of becoming the thirty-eighth state to ratify," causing "administrative confusion").

87. Remember that *Coleman v. Miller*, the Supreme Court's last pronouncement on the matter, ceded Congress with plenary power to decide this "political question." Neither the courts, according to *Coleman*, 307 U.S. 433 (1938), or the president, according to *Hol-*

over the states. It is doubtful that the Framers intended to cede to Congress such unchecked authority in the process. When Hamilton suggested to the delegates of the Philadelphia convention that Congress should be allowed to propose amendments—that branch not being included in the amending process under the prevailing plan⁸⁸—he reassured delegates that Congress would not be able to dominate the process. In his reasoning, Hamilton reaffirmed that the amending process must ultimately account to the people themselves and that Congress' role is to be helpful rather than hegemonic:

The National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention— There could be no danger in giving this power, as the people would finally decide in the case.⁸⁹

Congress cannot control the ratification process because when proposing an amendment, the states have final authority over the ratification process. To allow a different result would be to invite the abuses of federal self-dealing that the constraints in Article V were intended to guard against.⁹⁰ Consistent with the intent for Article V to secure a critical mass of concurrence for fundamental governmental change and to prevent federal self-dealing, Congress has no role in the amendment process once it either proposes an amendment to the states or convenes a convention for purposes of originating an amendment to be sent to the states.⁹¹

According to Article V, an amendment becomes “valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof”⁹² For the constitutional amending process to rest on the consent of the governed and resist self-dealing by federal officials, an amendment becomes valid only when ratified unequivocally by three-quarters of the states. If a last-minute rescission prevents a particular amendment from being validly ratified, neither

lingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), have any prerogative to check the determinations of Congress.

88. See generally DUMBAULD, *supra* note 29, at 433-34.

89. See 2 FARRAND, RECORDS, *supra* note 17, at 558.

90. See Amar, *Consent*, *supra* note 12, at 460 (arguing that high hurdles placed in amendment process were intended to prevent self-dealing by federal officials).

91. In originating an amendment, Congress also has the power to specify whether the amendment should be ratified by legislature of the states or by special conventions convened in the states. See U.S. CONST. art. V.

92. U.S. CONST. art. V.

Congress nor any other institution may nudge it along. On the other hand, if the tally is close, there need be no doubt about states that ratify after an earlier rejection. This approach, though it would allow for more play at the joints, would not undermine the legitimacy of the process or of an amendment passed in conformance with it. What undermines the legitimacy of the amending process at present is the uncertainty about exactly what the rules are.

This uncertainty has already delayed the acknowledgment of several amendments well beyond their constitutional validity. These amendments—including the Twelfth, Fifteenth, and Nineteenth Amendments—received the requisite number of ratifications, but with at least one state attempting to rescind, languished in legitimacy limbo until an equal number of states as those rescinding had unequivocally ratified.⁹³ This represents an impermissible encroachment of the central government on the prerogative of states to alter the Constitution with a three-quarters concurrence.⁹⁴

During the ratification of the Twelfth Amendment, New Hampshire's governor vetoed the state legislature's ratifying resolution.⁹⁵ A valid New Hampshire ratification would have been the last state necessary for a three-fourths majority. "Rather than proclaim the amendment part of the Constitution, the national government waited until another state ratified thus obviating the need for a resolution of the question."⁹⁶ All three branches of the federal government contributed to the delay in recognizing the valid ratification of the Fifteenth Amendment. The Secretary of State—an executive branch official whose duty it was to certify an amendment once it received three-quarters of the states' ratifications—received notice that Ohio had ratified after an earlier rejection and New York had rescinded its earlier ratification.⁹⁷ Ultimately, the Secretary delayed certification until enough additional states ratified to cover the problematic ratifications.⁹⁸ Congress decided to look into the issue, but never formulated an answer beyond convening committees.⁹⁹ With the Nineteenth Amendment, the third branch of government dodged the

93. Cf. *Idaho v. Freeman*, 527 F. Supp. 1105, 1149 (D. Idaho 1981), *vacated as moot sub nom. NOW v. Idaho*, 459 U.S. 809 (1982).

94. See THE FEDERALIST NO. 84, at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

95. See generally MYERS, THE PROCESS OF CONSTITUTIONAL AMENDMENT, S. DOC. NO. 76-314, at 34 (1940).

96. *Freeman*, 529 F. Supp. at 1149.

97. See *id.* at 1144.

98. See *id.* at 1149.

99. See *id.*

issues of rescission and ratification. Finding nothing wrong with the delay of federal officials in recognizing the amendment's validity until enough extra states had ratified to cure problematic ratifications, the Court, in *Leser v. Garnett*,¹⁰⁰ stated:

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other States—Connecticut and Vermont—have adopted resolutions of ratification.¹⁰¹

This is an unacceptable way to operate the Constitution because it imposes an even higher requisite number of ratifications than called for by Article V. Arguably the Constitution is already too difficult to amend without extra hurdles being imposed.¹⁰² But most perniciously, it invites constitutional disaster in the form of a future amendment that will not have the same margin of safety as these amendments have received.

II. Does a Pending Amendment Expire Due to Neglect?

Uncertainty about whether amendments expire for failure to secure the requisite number of ratifications within a reasonable time further compounds the confusion of the amending process. To remove the uncertainty currently clouding the ratification process seems to require either declaring the Twenty-Seventh Amendment's two-century ratification period unconstitutional or accepting the possibility that pending amendments will forever creep toward ratification. This latter possibility appears especially unattractive in light of the amendment that Congress proposed in order to perpetually entrench slavery. An additional obstacle to the resolution of this issue is the Supreme Court's conflicting case law on the issue of timeliness. In *Dillon v. Gloss*,¹⁰³ the Court found, implicit within Article V, that an amendment must be ratified within a "reasonable time" so that fundamental governmental change secure a "contemporary consensus," that is, the

100. 258 U.S. 130 (1922).

101. *Id.* at 137.

102. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 1, at 237, 257, 265 (concluding that "the U.S. Constitution is unusually, and probably excessively, difficult to amend" especially with respect to the second method of amendment).

103. 256 U.S. 368, 375 (1921).

consent of the governed. But in *Coleman v. Miller*,¹⁰⁴ a deeply divided Court abdicated its earlier role in deciding whether a certain time exceeded the reasonableness requirement to cede plenary authority to make timeliness determinations to Congress. One reason given by the *Coleman* Court was that the amending process is "political" in its entirety," from beginning to end.¹⁰⁵ Thus, there seems to exist a timeliness requirement, but no means for determining its boundaries: the Court will not (because of the political nature of the question) and Congress cannot (due to the inability to bind a future session).

Indeed, the Court's characterization of the amending process as political in the nature of the political legislative branch proved prescient. Congress confronted the issue in the stark terms of the two-century ratification of Madison's congressional pay-raise amendment in a most political way. With the next election looming, congressional representatives were not in a mood to embrace the inevitable political fallout of declaring a popular congressional check invalid—even if the precedent for doing so appeared ominous. Thus, the congressional precedent "holds" that amendments do not expire during the ratification process.

Coupled with the denial of state rescission power, congressional precedent on the amending process renders Article V the most antidemocratic and countermajoritarian provision of the United States Constitution. Once an amendment is proposed to the states, citizens will become disenfranchised of their political agency as their states ratify—however sporadically and slowly—until the vast majority of the American electorate of almost three-quarters of the states are powerless to act on the pending amendment. At the point that the amendment receives the requisite three-quarters ratification, the entire nation will be bound by the new amendment valid to all intents and purposes because of the one-way ratcheting effect of the Article V process.

A. The Case for Eventual Expiration of Pending Amendments

This one-way ratcheting effect of Congress's denial of state rescission power called for some way to keep Article V from being profoundly antidemocratic as pending amendments slouched toward birth. Noted constitutional scholar Judge Jameson answered this call by injecting a new element of responsiveness to the people into the

104. 307 U.S. 433 (1939).

105. *Id.* at 459 (Black, J., concurring).

amending process that Congress had made less responsive in disallowing rescissions. Jameson's solution to the one-way ratcheting effect of denied rescissions recognized that the amending process should command a sufficient consensus of support by the people themselves for a proposed constitutional change.¹⁰⁶ He formulated this element of responsiveness to require that ratification occur within a reasonably contemporaneous time period. Jameson argued:

[A]n alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.¹⁰⁷

The contemporary consensus requirement, while not an express element of the Article V amending process, seemed to be implied by the Framers' declarations that amendments should reflect the will of the people.¹⁰⁸

Jameson's proposal solved the problem of amendments that had been proposed by Congress, had failed to secure ratification even after a lengthy period, and had then become irrelevant due to changed circumstances. When Jameson issued his treatise, twenty-six years had elapsed since Congress proposed the Corwin Amendment in hopes of averting violence over the issue of slavery.¹⁰⁹ To say the least, the antebellum compromise amendment to perpetually entrench slavery in the Constitution no longer offered a compromise to safeguard national unity. By requiring a contemporary consensus, however defined quantitatively, moribund amendment proposals could be permanently put to rest. Further, citizens and political representatives could rest easier knowing no time bombs lurked to potentially cause unpleasant surprise. Thus, the inherent time limitations for proposed

106. See JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING § 526, at 546-47 (4th rev. ed. 1887); see also Comment, *Ratification of Child Labor Amendment by a State Legislature After Previous Rejection*, 47 YALE L.J. 148, 150 n.13 (1937) (noting that contemporaneous ratification requirement probably derived from Jameson's treatise).

107. JAMESON, *supra* note 106, § 585, at 634.

108. Remember that when Jameson issued his treatise, Congress had not yet begun its practice of including a seven-year time limitation in its proposals of amendments to the states.

109. In 1861, Congress proposed the following amendment to the states: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." BERNSTEIN & AGEL, *supra* note 9, at 302 (statement by Senator Corwin).

amendments seemed like an elegant solution to the development of congressional precedent denying state rescission power.¹¹⁰

Little surprise attended the Supreme Court's adoption of Jameson's time limitations approach when the Court decided a challenge to the Eighteenth Amendment. In *Dillon v. Gloss*,¹¹¹ the Court decided a challenge to Congress's limitation of the Eighteenth Amendment's ratification to a period of seven years.¹¹² In an attempt to kill two birds with one stone, the Court ruled that not only did Congress have the power to limit the ratification period, but also that amendments *must* be ratified within a reasonable time even if Congress does not specify a particular time. That Article V did not express this reasonable time requirement did not daunt the Court, but instead supported its conclusion:

That the Constitution contains no express provision on the subject is not in itself controlling We do not find anything in the Article [V] which suggests that an amendment once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective.¹¹³

Indeed, the Court articulated three reasons for its conclusion. First, the *Dillon* Court reasoned that congressional proposal and subsequent ratification constitute "succeeding steps in a single endeavor."¹¹⁴ This seems to draw a parallel to ordinary Article I-type federal legislation in which the President has only a short time to approve or disapprove a bill proposed by Congress.¹¹⁵ Second, the Court reasoned that because Congress only proposes Article V-type legislation "when there is deemed to be a necessity therefor," states

110. According to Jameson's argument, expired amendments would not prevent the proposed constitutional change from being made. Instead, Congress would only have to repropose the amendment (or similar) version to the states.

111. 256 U.S. 368 (1921).

112. The Eighteenth Amendment was the first amendment proposed by Congress with an express ratification time limitation. With the exception of the Nineteenth Amendment, that practice has continued for all subsequent amendments, even to the point that the seven-year period has become entrenched as the chosen length of time. Since the Twenty-Third Amendment, however, the limitations period has accompanied the proposal, rather than being included in the text of the amendment itself. Compare U.S. CONST. amends. XVIII, XX-XXII (specifying ratification period in text of amendment), with U.S. CONST. amends. XXIII-XXVI (specifying ratification period in accompanying proposal). See generally Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 920-21 (1979) (discussing ratification deadlines, and noting that Nineteenth Amendment had no deadline).

113. *Dillon*, 256 U.S. at 373-74 (1921).

114. *Id.*

115. See U.S. CONST. art. I, § 7, cl. 2 (Presentment Clause).

should “presently” take up the matter and vote upon the proposal.¹¹⁶ Finally, the third reason given by the Court is the most substantial, not only in the amount of attention that it received in the decision relative to the short shrift of the first two, but in the persuasive effect it has had on subsequent commentary. Acknowledging Jameson’s treatise, the Court quoted his statement:

“[T]hat an alteration of the Constitution proposed to-day has relation to the sentiment and felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.”¹¹⁷

Reasoning, as did Jameson, that “ratification is but the expression of the approbation of the people” the Court ruled that the ratification process must reflect the contemporaneous will of the people.¹¹⁸

Despite the adoption of the contemporaneousness requirement for amendment ratifications, the *Dillon* Court declined to state what length of time would be insufficiently contemporaneous. The Court did rule that the seven-year period specified by Congress for the Eighteenth Amendment passed muster. But the Court failed even to specify criteria for a calculus to determine the reasonableness of a time period. Moreover, the Court neglected to state whether all prospective amendments share the same limitations period—whatever number of years it might prove to be—or whether an amendment’s topic or type of proposed change affect the ratification deadline.¹¹⁹ At most, the *Dillon* decision seems to suggest a range within which the ratification limitations period must fall. Seven years clearly satisfies the contemporaneousness requirement. Sixty years, however, seems to have been too long for the *Dillon* Court. When the Court decided *Dillon* in 1921, it noted that the continuing viability of the Corwin Amendment—proposed in 1861, and the most recent of unratified amendments without a congressionally specified time limitation—constituted an “untenable” proposition.¹²⁰ Ultimately, the *Dillon* Court did little to establish a ratification limitations period, except to posit its existence.

116. *Dillon*, 256 U.S. at 375.

117. *Id.* (quoting JAMESON, *supra* note 106, § 585).

118. *Id.*

119. For example, one might expect that amendments called for by the states to remedy a seemingly temporary abuse of power by a federal official might require quicker consideration than a sweeping change to the organization of individual rights protections under the Constitution.

120. *See Dillon*, 256 U.S. at 375.

Despite this failure of the Court to delineate a time period or provide any more authority than Article V implications and a treatise on constitutional conventions,¹²¹ constitutional commentators accepted the result and the scholarly consensus embraced the result in *Dillon*.¹²² But then in *Coleman*, the Court ceded the issue to Congress. By allowing the very institution that proposes the amendment to determine whether the ratification was valid, the Court essentially nullified the requirement. "*Coleman* could be interpreted as an evisceration of any real timeliness requirement, since the branch that initially proposed an amendment [Congress] would also be able to decide whether the amendment had been added to the Constitution."¹²³ In effect the express holding of *Dillon* and the de facto effect of *Coleman* conflict.¹²⁴

In one respect, however, *Dillon* and *Coleman* agree: the Court has been unable to formulate exactly what is the definite time beyond which a ratification must be invalid. Assuming amendments must be ratified within a reasonable time implies that there is a time which is too long. Yet, no one has put a number on this unreasonable time. The Court punted the issue to Congress, with the result, already noted, that the ratification timeliness requirement has become even less certain.

Article V does not provide even the slightest guidance on what a reasonable time would be. Seven years is the longest time that has definitely been accepted by Congress and the Court. Yet, the seven year requirement originated not on the basis of principle but as a compromise between "wet" and "dry" states on the issue of prohibition repeal.¹²⁵ Thus, advocates of this position are willing to accept the imposition of a constraint on the amendment process that has no dis-

121. Jameson's treatise acknowledged that it would only "touch upon the subject of constitutional provisions for amending Constitutions." JAMESON, *supra* note 106, § 525, at 546. Indeed, seven of the eight chapters of Jameson's treatise concern state and federal constitutional conventions.

122. See Note, *supra* note 49, at 394 n.8 (collecting authority); see also, e.g., HENRY ROTTSCHAEFER, CASES ON CONSTITUTIONAL LAW 450 (1939); William A. Platz, *Article Five of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 36 (1934); Note, *What Is the Status of the Child Labor Amendment?*, 26 GEO. L.J. 107, 113 (1937).

123. Dalzell & Beste, *supra* note 78, at 520.

124. See *id.*

125. The choice of seven years at the limitations period arose as the result of a compromise between "dry" representatives supporting prohibition and "wets" who favored Eighteenth Amendment repeal. Thus, there is nothing magical about seven years per se. See JAMESON, *supra* note 106, §§ 583-86, at 631-36; see also BERNSTEIN & AGEL, *supra* note 9, at 173-74 (noting time limitation's origin in compromise); Ginsburg, *supra* note 112, at 920-21.

coverable basis in Article V. Moreover, they are willing to accept some federal branch—some say the Court, some say the Congress—negating the act of states ratifying an amendment. As “[a] rescission of a prior ratification indicates a reassessment of the state’s expression of consent, and by terminating its consent, it suspends the need for a congressional decision as to the contemporaneousness of the prior consent.”¹²⁶ Thus, the willingness to accept these results has come from myopic examinations of this issue alone. The issue of timeliness, however, directly implicates both the right of states to rescind, and the question of who should declare an amendment’s successful ratification.

B. The Argument Against Expiration

Article V does not impose deadlines on the ratification process. Neither does it prevent amendments from being conditioned with a “statute of limitations” when Congress submits the measure to the states.¹²⁷ In the absence of express constitutional instruction on the issue of whether an amendment expires due to neglect, the intent of Article V as a remedy for problems inhering in the central government and vehicle for improvements controls.

At its root, the issue of whether a pending amendment expires after a long period of neglect by the states contains the question of whether authority over the states exists in the ratification process. The Constitution contains no express provision empowering Congress, or any other central government branch, to nullify the action of a state in the ratification process. Instead, the federal nature of the ratification process confers rare parity with Congress upon the states. Thus, the extent of power to nullify states’ actions in the ratification process is the extent to which states’ authority is eroded.¹²⁸ In short, a power of Congress, or the federal courts, to declare an amendment expired would be a power of the central government, defeating the purpose of Article V—to strike a balance between the federal and national nature of the union.

126. *Idaho v. Freeman*, 529 F. Supp. 1107, 1145-46 (D. Idaho 1981), *vacated as moot sub nom. NOW v. Idaho*, 459 U.S. 809 (1982).

127. See Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 878 & n.11 (1980).

128. A similar calculus of the allocation of powers applies to the issue of rescission. “[I]f Congress could refuse to recognize a state’s rescission, it would mean that Congress would supplant the expression of the people’s representative with its own assessment of consent by holding that the prior expression of consent is still valid.” *Freeman*, 529 F. Supp. at 1146.

There can be no doubt about the necessity for sufficient time for deliberation to allow states to give their informed consent to a proposed amendment. In his commentaries on the Constitution, Justice Story first noted that the ratification process could require good number of years:

Time is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action.¹²⁹

At the time Justice Story wrote, no amendment had required more than two years to secure ratification by three-quarters of the states.¹³⁰ Nonetheless, Justice Story's commentary clearly anticipates that some amendments will require a longer period according to the nature of the amendment.

Once Congress submits its proposed constitutional text to the state, its role in the amendment process ceases.¹³¹ As a coequal with the states in the amending process, Congress has no authority over the states to prevent them from ratifying a pending amendment regardless of the number of years between ratifications. The congressional solution is to impose ratification deadlines along with its proposals. The state solution to the problem of insufficient time for deliberation is to call a constitutional amendment convention on the subject. Ultimately, amendments do not expire on their own.

Ironically, the rule that amendments without internal time deadlines do not expire may lend more certainty to the ratification process.

When the time after proposal but before ratification stretched into decades and centuries, it would be unclear to state legislatures whether they could assume that the amendment was a "dead letter" or whether they should take the time and effort to rescind their prior ratifications if they no longer support the amendment. This problem might be countered by the establishment of a presumption that a state's ratification would continue for all time as long as the state did not attempt to rescind its ratification. A presumption of this sort would be problematic, however. Not only does it seem unrealistic to assume that such a presumption would be understood and recognized by successive generations of state legislators, but most commentators and

129. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1824, at 688 (1833).

130. The first twelve amendments to the Constitution were ratified in quick order. See 1 DEBATE, *supra* note 23, at 984-85 (listing dates of proposal and ratification).

131. See generally Dellinger, *supra* note 10; Rees, *supra* note 127, at 877-86.

the Supreme Court have refused to recognize a state's right to rescind its prior ratification of an amendment.¹³²

Granted, this option gives rise to an unenviable lack of closure to the process of amending the Constitution. For lack of expiration after long periods, forgotten battles may resurface unnecessarily or even dangerously. Slavery has been put to rest, hopefully never to rise again. That the Corwin Amendment haunts the annals of history is not desirable. A congressional declaration of expiration, however, does not inter this issue.

As the Corwin Amendment dramatically illustrates, substantively evil amendments are theoretically possible under *any* amendment scheme, including Article V's. Unless all amendment is prohibited, tyrannous amendment is always possible. And if amendment is prohibited, changed circumstances may *require* amendment to avoid tyranny. Why are we willing to trust government to amend, but not the People?¹³³

It would be best if some definite time period existed during which amendments remain viable, and not one bit longer. But any definite time period must be an arbitrary choice, and would thus become another arbitrarily chosen hurdle in an already devilishly difficult process. The best we could do would be to amend Article V to impose such a period. Gloss aside, we should not whitewash the Constitution. Superficial fixes have an unnerving tendency to become problematic during difficult times. All of this, of course, is presently relevant to only four very old, almost forgotten, amendments; but, this is what Justice Butler said of the current Twenty-Seventh Amendment while it was still pending earlier this century.¹³⁴

C. May Congress and the States Impose Ratification Deadlines?

The fact that amendments do not expire on their own does not also mean that amendments cannot be given an expiration date. Historically, there has been little challenge to the assumption that amendment ratification deadlines are valid. Indeed, when the Twenty-Seventh Amendment passed, a flurry of activity in Congress to check for other time bombs was limited to a search for amendments without attached ratification deadlines. Similarly, when Congress considered an extension of the deadline for ratification of the Equal Rights Amendment, scholars did not question the efficacy of the imposed

132. Dalzell & Beste, *supra* note 78, at 527.

133. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1098 (1988) [hereinafter Amar, *Philadelphia Revisited*].

134. See *Coleman v. Miller*, 307 U.S. 433, 472 (1939) (Butler, J., dissenting) (quoting *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921)).

deadline, but whether Congress could extend such a deadline after the initial proposal.¹³⁵ Were congressionally imposed deadlines mere nullities, then the ERA would still be pending, and only three states short of constitutional validity.¹³⁶ If, as the consensus seems to assume, Congress may impose a ratification deadline, may states also condition their ratifications with a deadline? As a matter of parity, states are coequals in the constitutional amending process. Additionally, one court has reasoned that states implicitly conditioned their ratifications with the requirement that the amendment pass within the time limitation imposed by Congress.¹³⁷ Surprisingly, the widespread acceptance of congressional power to condition ratification has not raised this corollary issue of whether states may do the same. Perhaps equally surprising is the quiet acquiescence with which congressionally imposed amendment deadlines have been received.

1. *Congressional Power to Impose a Deadline on the Ratification Process*

Since the Eighteenth Amendment, Congress has imposed ratification limitation periods upon proposing constitutional amendments to the states.¹³⁸ Little controversy has attended this congressional practice. Interestingly, Madison's argument that a constitutional text may not be conditionally accepted seems as applicable in the context of a time condition as it does in the context of rescission of a state's earlier ratification.¹³⁹ Judge Jameson, who first raised this Madisonian argument in the context of amendments, failed to apply the argument to time limitations imposed by Congress. Subsequent commentary also has not quarreled with the practice of congressionally imposed ratification deadlines.

Article V does not expressly prohibit ratification deadlines. And, as a matter of policy, it is unproblematic that the institution proposing

135. Compare Ginsburg, *supra* note 112 (arguing that Congress could extend ratification deadline for equal rights amendment), with Rees, *supra* note 127 (arguing that Congress could not extend deadline once proposed to states).

136. The constitutional proposal that would still be pending—in addition to those without attending deadlines—would be the District of Columbia Statehood Amendment. See BERNSTEIN & AGEL, *supra* note 9, at 303.

137. *Idaho v. Freeman*, 529 F. Supp. 1107, 1153 (D. Idaho 1981), *vacated as moot sub nom.* *NOW v. Idaho*, 459 U.S. 809 (1982).

138. The current practice of specifying the deadline outside of the proposed constitutional text itself began as a response to concerns about the Constitution being cluttered with provisions about time requirements that became mere surplusage upon passage.

139. A ratification deadline is after all clearly a conditional assent: one that is withdrawn if a condition subsequent is not met. But a rescission is an unconditional withdrawal of assent.

the law simultaneously constrains the period of pendency. Dangers of self-dealing by federal officials do not present themselves in this situation,¹⁴⁰ for an impracticably short ratification deadline would be self-defeating. A very long ratification period does not provide the federal government undue advantage over the states. In the instance of an amendment arising out of a call by two-thirds of the states, however, the calculus of interest and self-dealing changes significantly.

For example, if a requisite number of states call for a congressional term-limits amendment, Congress could thwart the will of the states by setting an impossibly quick ratification deadline. For this reason, Congress's power is expressly confined by Article V to the calling of a constitutional convention to propose an amendment.¹⁴¹ Congress may not impose a deadline in such an instance. Of course, the composition of such a convention is an unresolved matter, since one has never been called. If, as some commentators suspect, the Congress would elect many or all of its own members as delegates to a constitutional convention, the wisdom of allowing the convention to specify a deadline poses similar dangers of federal self-dealing for which Article V is an intended remedy. Thus, a rule that Congress may impose a deadline for proposals that it originates, but for amendments called for by the states, comports with the remedial nature of Article V.

2. *Prerogative of Ratifying States to Specify Time Limitations*

As a collective, coequal branch with Congress in the amending process, states may also have the same power to condition their assents with a ratification deadline. Although simple parity suggests this prerogative, the complexity in keeping track of valid ratifications might prove formidable. Although the permanence of a constitutional amendment suggests the incongruousness of short deadlines, states should have the same power to ensure contemporaneousness as Congress.¹⁴² For example during the ratification of the proposed Equal Rights Amendment, Kentucky and Oregon included time limits in their ratification documents.¹⁴³ Although the issue of these time limits' validity did not require immediate resolution because of the ERA's failure to pass, future amendments will likely raise the issue.

140. *But see* Amar, *Consent*, *supra* note 12, at 460.

141. *See* THE FEDERALIST NO. 85 at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

142. *Freeman*, 529 F. Supp. at 1154.

143. *See* Rees, *supra* note 127, at 915 & n.201.

Ultimately, the less convenient option of allowing states to condition their ratifications with a deadline proves the least problematic in terms of federal theory. First, Article V provides that each state legislature ratify or reject an amendment according to the internal rules that the legislature sets.¹⁴⁴ Second, to deny states the power to impose a ratification deadline requires an external authority—de facto, the federal government—to impermissibly nullify state actions.

III. Who Should Announce the Advent of Newborn Amendments?

Questions about who should announce a new constitutional amendment do not arise out of a constitutionally conferred legal duty,¹⁴⁵ but out of the very practical need to provide notice to members of our society when our most fundamental rules change. As legal philosopher H.L.A. Hart noted, every society requires some means to apprise its members about which rules are legally binding, which are exhortatory, and which are nullities.¹⁴⁶ Of course, the text of an amendment itself reads the same during its pendency and after its ratification. Thus, according to Article V, something external to the text must serve to declare an amendment's validity upon successful ratification.¹⁴⁷ As ratification of an amendment may require many generations, as the Twenty-Seventh Amendment attests, institutional (rather than human) memory seems necessary to keep track of the process.

The most obvious candidate for keeping a tally of ratifications may be the ratifiers themselves—the states. Since an amendment becomes valid upon ratification by the last state constituting a three-quarters majority, why should an announcement by that state not suf-

144. See *Dyer v. Blair*, 390 F. Supp. 1287, 1303 (N.D. Ill. 1974).

145. Although the occasional need to resolve questionable ratifications and proposals will present itself, a widely accepted rule of recognition by a particular institution will help avert crises of constitutional doubt about which provisions remain legitimate.

146. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994). Calling them "rules of recognition," Hart described the importance of having well-established means for sorting rules into laws, customs, and etiquette. *Id.* at 100-10.

147. Remember that in addition to procedural constraints, Article V contains substantive constraints disallowing amendment of the slave-trade constitutional provisions prior to 1808, or amendment—at any time—of the provision that states enjoy equal representation in the U.S. Senate. Recently, there has been a focus on whether Article V implicitly contains other substantive constraints on such fundamental rights as speech, conscience, and assembly. See, e.g., Amar, *Philadelphia Revisited*, *supra* note 131, at 1044-45 n.1; Jeff Rosen, *Was the Flag-Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991). While interesting and important, this issue lies beyond the scope of this Article. Nonetheless, the scholarly consensus agrees that the amending process is substantively delimited, even if only by the express Article V guarantee of equal representation in the Senate.

fice? Amendment-capping states could include in their declarations of validity a listing of the originating Congress and the other ratifying states. However, historical precedent and Supreme Court authority suggest that Congress should declare an amendment's validity.¹⁴⁸ The United States Code, by contrast, cedes the record-keeping and certifying function to an executive branch official.¹⁴⁹ The Constitution itself does not textually commit a duty to declare an amendment's validity to any particular branch or official. Thus, perhaps the President—with the vast communicative resources attending that office—may be best suited to announcing a new amendment's validity. Further, presidents have seemingly always wanted a role in the amending process.¹⁵⁰ Alternatively, the Court itself may prove a good candidate for resolving amending process questions because it has effectively allayed challenges to several amendments' validity. Resort to the courts remains a certainty, especially with amendments ensuring or conferring individual rights. Of course, the resolution of such suits will necessarily depend upon a determination of whether or not an amendment has the effect of law. Yet, a striking down of an amendment by unelected officials with lifetime tenure would seem to constitute a profoundly antidemocratic action.

A. The States?

Several advantages would inhere in a practice of looking to the declaration of the last state constituting a three-quarters ratifying majority as the accepted form of notice of an amendment's validity. First, it would alleviate the potential for self-dealing by federal officials seeking to delay, or to deny, an amendment's validity by giving tardy notice. Second, this practice would comport with the amending scheme of Article V, which requires no further action following the ratifications of three-quarters of the states.¹⁵¹ Ultimately, any practice of recognizing an amendment's validity that is divorced from the state

148. See *infra* Part III.B (discussing Civil Rights Amendments' enactments and *Coleman v. Miller*).

149. See 1 U.S.C. § 106(b) (1984) (instructing Archivist of the United States to keep track of ratifications and issue certificate when three-quarters of states have ratified).

150. See *infra* Part III.C (discussing efforts by presidents to assume amending process roles).

151. See *United States ex rel. Widenmann v. Colby*, 265 F. 998, 1000 (D.C. Cir. 1920), *aff'd sub nom. United States ex rel. Widenmann v. Hughes*, 257 U.S. 619 (1921) ("It is the approval of the requisite number of states, not the proclamation, that gives vitality to the amendment and makes it a part of the supreme law of the land."); see also Dellinger, *supra* note 10, at 389-405.

ratifications adds another hurdle to an already difficult amending process.¹⁵²

As a matter of federalism, Article V was drafted with the intent of keeping the central government in check by allocating sufficient power to the states.¹⁵³ For this reason, Article V proved to be a major selling point during the period of ratification of the Constitution itself, when Anti-Federalist fears of unlimited central government powers threatened to derail the new government's establishment.¹⁵⁴ Since adoption of the Constitution, however, concerns about a renegade central government have abated, focusing instead on the dangers of conflicts among states. The Civil War and the experience of Reconstruction have shown the potential for states to condone oppression and conflict.¹⁵⁵ Conversely, the experience of the '60s—both the 1860s and 1960s—has established the central government as guarantor of individual liberties. Thus, it would be regressive for the Federal Constitution to now foster either conflicts among states, or to undermine civil rights progress of the constitutional amendments.¹⁵⁶

Creating a duty in the states to keep track of the ratifications in order to certify an amendment's validity upon a three-quarters concurrence will engender state factionalism. States will inevitably vie to become the amendment-capping state as being the state to complete the amending process would come with more than just the symbolic honor of endowing an amendment with the force of law, but also with the prerogative to determine the effect of other state actions in the process. Competing declarations based on differing constitutional in-

152. Cf. Lutz, *supra* note 102, at 265 (concluding that United States Constitution is extremely difficult to amend.)

153. 2 FARRAND, RECORDS, *supra* note 17, at 558 (recounting Hamilton's defense of plan to allow Congress to propose and states to ratify amendments); THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

154. See generally BERNSTEIN & AGEL, *supra* note 9, at 22 ("Article V proved its worth by helping to clinch the adoption of the Constitution."); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 3 (1981) ("[T]he Constitution that came out of the deliberations of 1787 and 1788 was not the same Constitution that went in; for it was accepted subject to the understanding that it would be amended immediately to provide for a bill of rights.").

155. See generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136, 1151, 1162-67, 1180 (1991) [hereinafter Amar, *Bill of Rights*].

156. At the time of the Civil War, the charter looked to the language of freedom which was not the Constitution, but the Declaration of Independence of 1776. The reason for this lay in the fact that the Constitution—in Article V itself!—had not only condoned, but safeguarded the institution of slavery. See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1215 (1992) [hereinafter Amar, *Fourteenth Amendment*]. Since the adoption of the Civil Rights Amendments, however, the federal government's role in protecting individual liberties has become well established.

terpretations are easily imaginable as are potential anti-declarations of constitutional validity issued by states denying the legitimacy of putative amendments. Strength in numbers would become important as states chose sides on the question of ratification, and no central forum would be available for states to resolve suspect ratifications or rejections.

Until now, the attempts to become the amendment-capping state have been friendly contests among states seeking a common goal—to give validity to an amendment. Nonetheless, several races to become the amendment-capping state have already demonstrated the chaos that can ensue. During the ratification process of the Twenty-Fifth Amendment, several states attempted to be the state to give the proposal constitutional validity.

Attempting to gain the distinction of becoming the thirty-eighth state to ratify, North Dakota ratified one state too soon, and then, upon realizing its mistake, promptly attempted to withdraw its consent. Minnesota, aware of North Dakota's ratification but not its withdrawal, then ratified, assuming it had put the amendment over the top. Nevada's ratification followed immediately. . . . Does this actually make Nevada the thirty-eighth state?¹⁵⁷

Although noted in a slightly different context, the statement in *The Federalist* aptly describes the dangers of interstate conflicts determining the outcome of a selection process affecting the federal government: "Nothing can be more chimerical than to imagine that in a trial of actual force may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election."¹⁵⁸ In short, a declaration by the last state of a three-quarters ratifying majority cannot serve to resolve an amendment's validity without introducing unacceptable dangers into the amending process. After all, history has shown the chaos and confusion attending states' attempts to become the one state to give an amendment life. Thus, a single authority would seem better suited to the task of resolving ratification questions.

B. Congress?

Both historical and Supreme Court precedents affirm the prerogative of Congress to declare an amendment's validity. Since the First

157. FREEDMAN & NAUGHTON, *supra* note 2, at 18. Similarly, states vied for the honor of ratifying the Twenty-Seventh Amendment. See BERNSTEIN & AGEL, *supra* note 9, at 245.

158. THE FEDERALIST NO. 43, at 277 (James Madison) (Clinton Rossiter ed., 1961).

Congress dealt with the issue of how to treat state calls for a constitutional convention to propose declaration of rights amendments, Congress has often taken it upon itself to decide whether to give effect to state actions in the amending process. The First Congress, following the suggestion of James Madison, tabled the received calls from states for constitutional conventions until the requisite number was received. The issue was then expected to be taken up and decided by Congress.¹⁵⁹ During key moments in our national history, Congress has acted to allay doubts about the validity of amendments with questionable pedigrees.

The Fourteenth Amendment, with its proposal and ratification irregularities, perhaps benefited most from a congressional declaration of validity.¹⁶⁰ This Amendment's validity initially was subject to question because some state ratifications necessary for the Amendment's validity had subsequently been rescinded.¹⁶¹ Congress ultimately responded by denying the power of states to rescind after ratifying while affirming the effectiveness of ratification following initial rejection. Thus the congressional declaration effectively secured the validity of the Amendment. Similarly, congressional declarations of validity alleviated doubts about the passage of the Thirteenth and Fifteenth Amendments.¹⁶²

The important role played by Congress in securing the Civil Rights Amendments was not lost on the Justices of the Supreme Court who decided the Court's most recent decision on a challenge to a proposed amendment's legitimacy. *Coleman v. Miller* involved a challenge to the viability of the Child Labor Amendment on grounds that it had expired due to desuetude in state ratifications.¹⁶³ In response, the Court announced the plenary power of Congress to determine the validity of amendments:

159. See BERNSTEIN & AGEL, *supra* note 9, at 38.

160. Cf. David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 829-30 nn.253 & 255 (1987) (discussing problematic nature of exclusion of Southern representatives to Thirty-Ninth Congress and requirement that states ratify Fourteenth Amendment as precondition of readmission to union). See generally Ferdinand F. Fernandez, *The Constitutionality of the Fourteenth Amendment*, 39 S. CAL. L. REV. 378, 380-82, 392-96, 401-02 (1966).

161. Before the requisite 28th state ratified, Ohio and New Jersey attempted to withdraw their earlier ratifications. Despite the attempted withdrawal of consent, Congress passed a resolution declaring three-fourths of the states to have ratified, including Ohio and New Jersey. See DUMBAULD, *supra* note 30, at 436 n.17.

162. See BERNSTEIN & AGEL, *supra* note 9, at 103, 115 (noting intense congressional efforts to secure adoption of the Amendments).

163. 307 U.S. 433, 435, 451 (1939).

If it be deemed that such a question is an open one when the [ratification time] limit has not been fixed in advance, we think that it should also be regarded as an open one for consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment.¹⁶⁴

Further, the Court stated that the congressional determination of the amendment's validity would not be subject to judicial review.¹⁶⁵

Similarly, constitutional commentators have urged deference to congressional declarations about the validity of amendments in light of historical and case law precedents.¹⁶⁶ Much has been made of the benefit conferred by the congressional precedent of denying states the power to rescind. Thus, these commentators urge that congressional declarations on putative constitutional amendments continue to determine the validity of amendments.¹⁶⁷

Congressional precedent, however, is oxymoronic. The very nature of the legislative process disallows one session of Congress from binding future sessions. No matter how entrenched or well-established a congressional practice, it may be changed upon concurrence of a simple majority of the members of Congress.¹⁶⁸ Thus, changing Congress's past practice of disallowing state rescissions—followed for a number of amendments—requires *fewer* votes than needed to propose a single amendment. In short, congressional precedent proves descriptive of past actions instead of prescriptive for future congressional actions and declarations. Thus it would be possible for amendments declared ratified by Congress to be declared invalid by the next session of Congress.¹⁶⁹ Consequently, one can imagine a scenario in

164. *Id.* at 454.

165. *See id.*

166. *See, e.g.,* FREEDMAN & NAUGHTON, *supra* note 2, at 15-19 ("Congressional Precedent"); Ginsburg, *supra* note 112, at 944 ("I also think, in light of the relevant historical, 'political, social and economic' considerations, that the Court would accord utmost deference to the first line decisions of Congress in this area."); Kanowitz & Klinger, *supra* note 54, at 1001 (urging deference to past decisions of Congress and the secretary of state on rescission issue).

167. *See* FREEDMAN & NAUGHTON, *supra* note 2, at 19 ("While Congress need not exhibit rigid consistency, it has nonetheless attempted over the years to assure the nation of some stability and rational predictability in its decision-making process—if only to maintain its credibility. Congressional history, then, can be taken as a reasonably reliable guide to future action on the legality of rescission. . . ."); Ginsburg, *supra* note 112, at 944.

168. CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS § 351, at 164-65 (U.S. Gov. Printing Office 1993).

169. If the vote in favor of recognition was close—with one or two members of each house casting the deciding vote—this scenario may not be totally improbable.

which the recognition or rejection of a highly controversial amendment could become a campaign issue so that the next congressional elections would determine the fate of an amendment. As a result, election-year rhetoric, more than the text of the Constitution, would govern the outcome of the amending process.¹⁷⁰

Despite the *Coleman* Court's statements, Congress cannot have plenary authority over the ratification process.¹⁷¹ At the very least, such congressional power would negate obstacles to federal self-dealing that the Framers intended to prevent. Consider a call by states for an amendment that proves unpopular among members of Congress—congressional term limits, for example. To allow Congress to stymie

170. Promises of support and opposition to potential constitutional amendments already play a large role in federal election politics. "[R]epublicans have an ever expanding laundry list of interests to which they pander. A favorite approach is a constitutional amendment. This year's Republican platform calls for seven constitutional amendments—on abortion, a balanced budget, victims' rights, school prayer, flag-burning, term limits and citizenship for children of illegal immigrants." Albert R. Hunt, *The GOP's Problems Run Deeper Than Bob Dole*, WALL ST. J., Aug. 8, 1996, at A11.

Since 1989, the number of senators voting in favor of a Flag-Burning Amendment has been steadily rising, with the last vote falling only three short of meeting the constitutional requirement of two-thirds of both houses of Congress. See Robin Toner, *Flag-Burning Amendment Fails in Senate, but Margin Narrows: Proposed Constitutional Change Is 3 Votes Short*, N.Y. TIMES, Dec. 13, 1995, at A1, A14. Similarly, the Balanced-Budget Amendment fell only four votes short in the Senate of the constitutional requirement. See Richard Powelson, *Mathews: White House Not Behind My Budget Vote*, KNOXVILLE NEWS-SENTINEL, Mar. 4, 1994, at A15. The ephemeral nature of amendment politics showed in the latest vote on the Balanced-Budget Amendment when all five of the senators who switched from an earlier "no" to "yes" votes faced reelection the next year. See Mark Z. Barabak, *Balanced-Budget About-Face Leaves Feinstein Credibility Insecure*, SAN DIEGO UNION-TRIB., Mar. 4, 1995, at A3. Note, however, that "[o]f the six senators who switched from 'yes' to 'no', thus sealing the amendment's defeat, none face re-election sooner than 1998, by which time [the March 1995] vote may well be politically irrelevant." *Id.* Even if voters remember, a vote either way can be justified because "voter support for a balanced budget—80 percent in the abstract—plummets to the 30 percent range when Social Security is threatened." *Id.*

Note that concerted efforts are also being made to revise the Fourteenth Amendment's guarantee of citizenship to those born in the United States and the First Amendment's Establishment Clause. See Neil A. Lewis, *Bill Seeks to End Automatic Citizenship for All Born in the U.S.*, N.Y. TIMES, Dec. 14, 1995, at A26 (noting substantial initial support of congressional representatives for eliminating automatic citizenship for those born within the United States); J. Michael Parker, *Conservative Christians Back 2 Amendment Ideas*, SAN ANTONIO EXPRESS-NEWS, Dec. 2, 1995, at A1 (noting congressional and grassroots support for "Religious Equality Amendment" and "Religious Liberties Amendment"). Whatever the wisdom of these proposals, it must be acknowledged that they target cornerstone constitutional provisions that at least merit greatest deliberation and care in being amended.

171. Indeed, in the Constitution there exists no textual commitment of amending process authority to Congress other than to propose an amendment on its own, or to call a constitutional convention for purposes of proposing an amendment.

efforts to amend the Constitution would be to allow the central government more control over the amending process than the Framers intended.¹⁷² Conversely, Congress could, and would be more likely to, nudge along amendments of which it is especially desirous. The Fourteenth Amendment provides an example of a Congress determined to ensure the validity of a particular amendment. This also runs contrary to the Framers' intent for the amending process, which was not to be as facile as the passage of ordinary Article I legislation.¹⁷³

If giving Congress plenary power is the solution to current amending process quandaries, then the cure may well prove worse than the disease. Instead of having Article V as a rule of recognition for validly adopted amendments, Congress would have continual power to requestion the adoption of an amendment. Moreover, it would politicize the amending process in a way that would not encourage greater deliberation, but would subject constitutional proposals to the greater vicissitudes of congressional elections.

C. The President and Executive Branch Officials?

Presidents have seemingly always craved a role in the amending process, despite the fact that the Constitution does not involve the executive branch in the amending process. President Adams attempted to secure a role for the executive branch in the amending process by assuming the task of certifying amendments upon sufficient ratification.¹⁷⁴ Even after the Supreme Court's decision in *Hollingsworth v. Virginia*,¹⁷⁵ which held that the President does not serve any function in the amending process, President Buchanan signed the proposed Corwin Amendment in hopes of lending the weight of executive authority to a compromise that was intended to avoid the Civil War.¹⁷⁶ Thereafter, President Lincoln signed what has become the

172. See 2 FARRAND, RECORDS, *supra* note 17, at 558; THE FEDERALIST NO. 85 at 525 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

173. Indeed, Madison noted that it would be inappropriate to approach the process of constitutional change in the same way as passing ordinary legislation. "[I]t is *not* to be inferred from this principle [of popular sovereignty] that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, *on that account*, be justified in a violation of those provisions . . ." THE FEDERALIST NO. 78, at 469 (Clinton Rossiter ed., 1961) (Alexander Hamilton).

174. See JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 20-21 (1987).

175. 3 U.S. 378 (1798).

176. See BERNSTEIN & AGEL, *supra* note 9, at 91.

Thirteenth Amendment in hopes of redeeming the authority of the executive branch after President Buchanan's support of a slavery-entrenching amendment.¹⁷⁷ President Andrew Johnson proclaimed the Fourteenth Amendment's validity, after having complained that Congress had not submitted it for his signature prior to its proposal to the states.¹⁷⁸ Finally, President Carter signed the resolution passed by Congress to extend the ratification time period for the Equal Rights Amendment.¹⁷⁹

While the Presidents themselves have not garnered a recognized role in the amending process, executive branch officials have played critical roles in the keeping track of pending amendments and issuing certificates upon ratification completion. In important instances, such as with the Fourteenth and Twenty-Seventh Amendments, executive branch officials were the ones who initiated a process culminating in the recognition of these Amendments.¹⁸⁰ The importance of the executive branch in the amending process will continue because current law provides that the Archivist of the United States—who directs an “independent agency within the executive branch”¹⁸¹—keep track of ratifications and issue a certificate upon successful ratification.¹⁸²

Arguably, the Archivist's decision to certify the Twenty-Seventh Amendment as valid, despite its two-century-long gestation, tipped the scales in favor to the Amendment's recognition. At the time of

177. *Id.* at 100.

178. FREEDMAN & NAUGHTON, *supra* note 2, at 60-61. President Johnson sent the following message to Congress: “Even in ordinary times any question of amending the Constitution must be justly regarded as of permanent importance. This importance is at the present time enhanced by the fact that the joint resolution was not submitted by the two Houses for the approval of the President.” 2 WATSON, *supra* note 58, at 1320 (statement of President Johnson).

179. See Ginsburg, *supra* note 112, at 930. Interestingly, one scholar argued that President Carter's action was necessary to grant an extension in light of Article I, Section 7, Clause 3. Charles L. Black, Jr., *On Article I, Section 7, Clause 2—and the Amendment of the Constitution*, 87 YALE L.J. 896, 899 (1978).

180. See BERNSTEIN & AGEL, *supra* note 9, at 246; Bernstein, *supra* note 4, at 540.

181. 44 U.S.C. § 2102 (1988) (“There shall be an independent establishment in the executive branch of the Government to be known as the National Archives and Records Administration. The Administration shall be administered under the supervision and direction of the Archivist.”). The Archivist of the United States is appointed by the President with the advice and consent of the Senate. *Id.* § 2103(a) (1988). The President retains the power to remove the Archivist, but must “communicate the reasons for any such removal to each House of the Congress.” *Id.*

182. See 1 U.S.C. § 106(b) (1988) (instructing Archivist of United States to publish new amendments “with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as part of the Constitution of the United States”).

the Archivist's certification, congressional elections loomed.¹⁸³ As a matter of campaign strategy, many members did not want to vote against the popular anti-salary-grab effect of the Amendment—even on a procedural issue such as the length of the ratification. Therefore, although Congress held hearings on the legitimacy of the Amendment's long ratification process, the Archivist's certification proved *fait accompli*. This experience requires anticipation of other future amendments whose validity will hinge more on the decision of the Archivist of whether to issue a certificate than on a congressional vote taken on a highly popular, controversial, or seemingly unquestionable matter. Would there have been a decision on the legitimacy of the amending process to receive unbiased scrutiny of the procedural steps for compliance with Article V dictates if the Twenty-Seventh Amendment had instead dealt with flag-burning? a balanced budget requirement? or victims' rights?

Executive branch officials—whether the President, Secretary of State, or Archivist—are not well suited, due to the nature of their offices, to resolve amending process questions. The very nature of the powers of the executive branch is to faithfully execute the laws, rather than to pass judgment upon the validity of a constitutional amendment.

D. The Judiciary?

The Supreme Court has a history of passing judgment on the validity of constitutional amendments and the actions of states, Congress, the President, and lower courts in the amending process.¹⁸⁴ Although none of the Court's decisions have struck down or denied the validity of an amendment, the possibility of such an action by the Court appears profoundly antidemocratic in nature. Judicial review of the amendment process assumes the power of five unelected Justices to deny the actions of three-quarters of the states and two-thirds of

183. Cf. Bernstein, *supra* note 4, at 542 ("Whatever the merit of these [amending process] issues, political realities dictated the speedy endorsement of the Twenty-seventh Amendment. On May 20, 1992, Congress confirmed the Archivist's decision by overwhelming margins in both houses.").

184. See National Prohibition Cases, 253 U.S. 350, 386 (1920) (affirming constitutionality of subject matter of amendment); Leser v. Garnett, 258 U.S. 130, 136 (1922) (same); Hawke v. Smith, 253 U.S. 221, 231 (1920) (reviewing state's submission of ratification of proposed amendment to the people of the state of Ohio); National Prohibition Cases, 253 U.S. at 386 (reviewing question of necessary quorum for Congress to propose amendment to states); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (reviewing whether presidential signature required to propose amendments to states); United States *ex rel.* Widenmann v. Hughes, 257 U.S. 619 (1921) (affirming federal court of appeals decision).

the members of Congress.¹⁸⁵ Further, judicial review of amendments seems to deny the power of broad-based democratic action to overturn earlier decisions of the Court.¹⁸⁶ In *Goldwater v. Carter*,¹⁸⁷ Justice Powell noted the problematic nature of passing judgment on an amendment intended to overrule an earlier Court decision:

The proposed [Child Labor] constitutional amendment at issue in *Coleman* would have overruled decisions of this Court. Thus, judicial review of the legitimacy of a State's ratification would have compelled this Court to oversee the very constitutional process used to reverse Supreme Court decisions. In such circumstances it may be entirely appropriate for the Judicial Branch of Government to step aside.¹⁸⁸

Thus, at the root of concern about judicial review of the amendment process lies a commitment to maintaining democratic avenues of change affirmed in Article V. Because constitutional amendments should be available to overturn the decisions of the Court, the ability of the judiciary to obstruct the successful ratification of an amendment should not be within the power of the Court.¹⁸⁹

Aside from serious questions about the antidemocratic characteristics of judicial review, the Court appears to be a good candidate for pronouncing that status of a questionable amendment. The judicial forum fosters deliberation of points for and against, offers the resolution of a single authority rather than many competing coequals in the amending process,¹⁹⁰ and alleviates the problem of delay in consideration of the amendment by federal officials. While other coordinate branches may delay addressing questions of constitutional validity, the judiciary provides a forum to petition for redress immediately upon the denial of rights or protection conferred (or, less likely, denied) by a new amendment.¹⁹¹

185. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962). References to the "Court" include first and foremost the Supreme Court, but also the lower courts in their capacity as initiators of the process of judicial review. See, e.g., *United States ex rel. Widenmann v. Colby*, 265 F. 998 (1920), *aff'd*, 257 U.S. 619 (1921).

186. Cf. Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto,"* 22 HASTINGS CONST. L.Q. 325, 330-31 (1995) ("By invoking the Article V power, 'WE THE PEOPLE' may exercise a 'republican veto' to check the High Court's hermeneutical tendency toward judicial oligarchy.")

187. 444 U.S. 996 (1979) (mem.).

188. *Id.* at 1001 n.2.

189. Subject to the caveat on denial of equal Senate representation as discussed below. See *infra* text accompanying notes 195-96.

190. Whether among states *qua* states, or between Congress and the states—each acting in a federal capacity in the constitutional amending process.

191. See generally Daniel L. Rotenberg, *Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process*, 14 HASTINGS CONST. L.Q. 77 (1986).

The problematic nature of judicial review also lies not in the Court usurping a role in the amending process which it does not have, but in the implications that such review would have on the balance of governmental powers and federalism. As noted by Professor Orfield, the Court does have the power to review the amending process for compliance with the instructions in Article V:

The theory of the courts in claiming the power to adjudicate amendments is doubtless the same as that back of the power to declare laws unconstitutional. The Supreme Court may set aside any unconstitutional act of Congress or of the President, and reverse its own and the decisions of the lower courts where the interpretation was erroneous. From this it follows that where there is a failure to comply with the regular mode of amendment prescribed in Article Five, the courts may regard the procedure as null and void.¹⁹²

Thus, the past half-century of Court silence on the amending process arises out of prudential abstention rather than a textual commitment by the Constitution of the duty to resolve the amending controversies to another coordinate branch.¹⁹³

If the Court chooses again to consider challenges to amendments, it would represent a departure from its decision in *Coleman*. Yet, the much-maligned *Coleman* case—which merely counsels abstention—is

192. See ORFIELD, *supra* note 66, at 13-14. Further, Hamilton contemplated judicial review of actions taken in the amending process for compliance with the extant Constitution:

Until the people have by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

THE FEDERALIST NO. 78 at 470 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Even the *Coleman* decision recognizes, while declining to exercise, the Supreme Court's jurisdiction over challenges to constitutional amendments. *Coleman v. Miller*, 307 U.S. 433, 442-43 (1939).

193. And indeed *Coleman* itself suggests that the Court's grounds for not reaching the merits were prudential. See *Coleman*, 307 U.S. at 438-41 (affirming Court's jurisdiction over constitutional challenges).

Even commentators who have urged deference to congressional pronouncements of constitutional validity acknowledge the potential for the Court to reenter the process of passing judgment on the amending process. The Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Powell v. McCormack*, 395 U.S. 486 (1969), show the more recent, more likely, thoughts on prudential abstention due to the presence of a political question. The Court's current view of judicial review thus appears more robust than that in *Coleman*. But cf. *Goldwater v. Carter*, 444 U.S. 996, 1002-03 (1979) (mem.) (citing *Coleman* with approval).

not nearly as pernicious a precedent as the Court's earlier decisions in challenges to amendments in which the Court heard and decided challenges to the subject matter of amendments.¹⁹⁴ Although the Court affirmed each amendment's legitimacy, the very hearing and decision on the substantive challenges assumes that the Court could decide that a particular amendment does not encompass subjects that are amendable. Article V, however, clearly delineates its extant substantive constraint—equal representation in the Senate may not be denied to a state without its consent. Therefore, the Constitution does not admit review of an amendment on substantive grounds, except in instances affecting Senate representation.¹⁹⁵ Instead, the Court should limit its review to the constitutionality of amending process actions by Congress and the states.¹⁹⁶ Accordingly, a few clear pronouncements would go a long way to restoring certainty to the amending process.¹⁹⁷

Most importantly, the limitation of judicial review to procedural aspects of the amending process would ensure that Article V's avenues of constitutional change would not be blocked.¹⁹⁸ Consider, for example, a successful challenge to an amendment's ratification on grounds that the lieutenant governor of a ratifying state cast the tie-breaking vote in its legislature.¹⁹⁹ There would exist a method of curing the defective ratification by complying with the clarified instructions of Article V. Even were the Court to hold that an amendment lapsed due to desuetude in ratifications, the substance of the amendment itself would not be barred from becoming part of the Constitu-

194. See *National Prohibition Cases*, 253 U.S. 350, 386 (1919) (affirming constitutionality of subject matter of Eighteenth Amendment); *Leser v. Garnett*, 258 U.S. 130, 136 (1922) (same).

195. A proposal seemingly as unlikely to happen as it would be easy to identify.

196. This limitation of judicial review to "legislative invasions" representing a "departure" from the amending process dictates of the Constitution comports with the expectations of *The Federalist*. See *supra* note 192 (presenting Hamilton's anticipation of judicial review of amending process actions taken by legislatures).

197. See Dellinger, *supra* note 10, at 386-87.

198. Judicial review can have a profoundly democratic nature when it compels governmental compliance with valid constitutional amendments. Cf. BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 10 (1991) ("Rather than threatening democracy by frustrating the statutory demands of the political elite in Washington, the courts serve democracy by protecting the hard-won principles of a mobilized citizenry against the erosion of political elites who have failed to gain broad and deep support for their innovations."). In short, the Court has power to protect the amending process against legislative departures from valid constitutional provisions.

199. Cf. *Coleman v. Miller*, 307 U.S. 433, 435-36 (involving challenge to validity of ratification of the Child Labor Amendment on grounds that lieutenant governor cast deciding vote in favor of ratification despite being state executive official, when Article V instructs state legislatures to act).

tion.²⁰⁰ With review of procedural challenges to amendments, the instructions of the Constitution would be clarified and defects in the process would remain curable likely with action taken by fewer than a handful of states.

The amending process would benefit from continued reduction of the friction that currently arises out of uncertainty about which state actions count in the ratification tally as well as other procedural questions. Just as *Hollingsworth v. Virginia*²⁰¹ smoothed a process that was taking on the additional step of presidential approval, so too would future decisions of the Court have the power to guide the amending process. Thus, the Court should apply its prudential abstention to substantive challenges to amendments, but reassume its role as interpreter of the Constitution for purposes of the amending process.

Conclusion

Much of the structure and the allocation of powers to the governmental system established by the Constitution can be understood through the interplay between three fundamental principles of American political thought: federalism, separation of powers, and popular sovereignty. Although government in the United States implicitly, and the Constitution itself expressly, begin with the sovereignty of the people themselves, this principle has been ignored in analyses of the amending process. The consensus of the people themselves is the most important factor in determining whether an amendment should be valid for intents and purposes as part of the Constitution. There can be no question but that the states which assay the sentiment of their citizens should be able to modify their actions on a pending amendment as the people modify their opinions of that amendment. To deny such a power is to deny that our government truly derives from the consent of the governed.

The power of a state to reverse an earlier action on a pending amendment is important to avoid denying citizens the ongoing right to participate in the constitutional amending process just because they

200. Even this worst case scenario for procedural challenges to a constitutional amendment, would allow Congress to repropose and states to ratify the same amendment. Further, future actions on amendment could be timed to comply with the limitations time period that would be established. Conversely, recent state actions might not need to be retaken if the Court's rationale were one requiring contemporaneousness.

201. 3 U.S. (3 Dall.) 378 (1798).

live in states that already ratified.²⁰² Because no federal branch can legitimately declare that states have taken too long to ratify, allowing rescission and ratification after rejection ensures that this is not just a government of "We the People of the Not-Yet-Acting States." That the Framers did not anticipate rescissions is both unsurprising and unimportant to this conclusion. Remember that until the twentieth century, no amendment had taken more than four years to be ratified.²⁰³ The Framers may have anticipated the contemporaneous action of the roughly dozen states comprising the union, during which time the popular sentiment on a particular subject was unlikely to reverse itself. Although the Framers did not speak to the issue of rescission, they reiterated their commitments to the preservation of inextricable links between governmental determinations and the people.

The Framers also did not speak to whether pending amendments expire or may be canceled by Congress. The Constitution contains no commitment of authority to cancel a pending amendment. However, the separation of powers principle inhering in the Constitution denies that Congress as a coequal to states (in their federal ratifying role) may abridge their power to ratify. Typical notions of federalism do not apply to the unusual governmental hierarchy for purposes of ratification. So viewed, it becomes obvious that Congress has no more power to constrain states to cancel an ability to act than to constrain textual constitutional commitment of decisional power to the President or Supreme Court. To allow Congress to declare as ratified an amendment that it originated ignores Article V constraints precluding self-dealing by federal officials. Further, this sort of congressional power over the amendment process, as affirmed by the Supreme Court in *Coleman v. Miller*, would also give Congress too much power to stymie amendments that might be unpopular with federal officials yet deemed necessary by the people—term limits, for example.²⁰⁴ In short, respect for coordinate branches of federal government prevents Congress from simply including rescinding states among ratifying states in promulgating an amendment.

Similarly, separation of powers denies Congress—or any other federal branch for that matter—from declaring an amendment lapsed

202. For example, the residents of several New England states since 1780 would have been denied their right to disapprove the reapportionment amendment proposed as part of the Bill of Rights.

203. See Ginsburg, *supra* note 112, at 920-21.

204. Perhaps it is not coincidental that the executive branch, which has no formal role in the amending process has a term limits amendment, while the legislative branch does not.

because states have taken too long to ratify or conclusively reject an amendment. This can be seen most clearly in an instance in which states would call for an amendment by the requisite two-thirds; Congress should not have the power to set such a short ratification deadline that it prevents states from getting the desired amendment. Similarly, Congress's power to impose ratification deadlines on its own proposals does not allow states to be taken hostage in other ways—by conditioning release of federal highway funds on a ratification of an amendment, for example. Those amendments proposed by Congress without time limits do not expire for lack of a power of any federal branch to kill them.

Finally, the principle of separation of powers prevents congress from being the final arbiter of whether or not an amendment has validly been passed. No federal branch should have the power to goal-tend the amendment process. Accordingly, though perhaps counter-intuitive to suggest that the Supreme Court should have the power to hear suits challenging the validity of amendments, this proposal is limited to procedural challenges—the substance of amendments being largely unconstrained by Article V. Moreover, the Supreme Court may only umpire the rules of the game. In doing so, the eradication of present confusion will make a difficult and disputed amendment process safe and easy as the Framers intended. Procedural defects could be cured according to definite rules. Our amendment process could use some curing, for it ails from unnecessary confusion and evident departure from the will of the people.

